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CONVEYANCER'S NOTEBOOK.

Infants and Part IV.—In connection with our note (*ante*, p. 61) under this heading a learned correspondent has drawn our attention to *Re Greenwood's Trusts*, 27 Ch. D. 359. In this case the word "jointly" in the expression "jointly seised or possessed" in section 10 of the Trustee Act, 1850, was construed as having a wider meaning than that of holding in joint tenancy. In fact Pearson, J., held, in a very short judgment, that the words covered a case of coparcenery, but his language was wide enough to make it also include a tenancy in common. The second point is material, because coparcenery more nearly approximates to joint tenancy than does tenancy in common and obviously there is a question whether coparcenery is comprehended within the expression "undivided shares", but this question will be dealt with elsewhere. The same correspondent also suggests the possibility that the Schedules containing the transitional provisions should be applied in the order in which they appear, and it has been held that in the case of the sub-paragraphs of paragraph 1 of Part IV, if one covers a case later sub-paragraphs are not to be considered: *Re Dawson's S. E.*, [1928] Ch. 421.

It may also be convenient to add that in the collections of precedents we find that some learned compilers have assumed that Part IV applies and some that Part III applies to an infant and adult holding as tenants in common.

It is a remarkable fact, but we have been unable to trace any other line of authority deciding the meaning of the word "jointly". Indeed, *Re Greenwood's Trusts* (*supra*) does not appear in a number of modern text-books, notwithstanding that it would seem to be applicable to the construction of the Trustee Act, 1925, s. 44 (1) (vi). Actually, *Re Greenwood's Trusts* adopted a slightly earlier decision of *Re Templer's Trusts*, 4 N. R. 494, but distinguished *MacMurray v. Spicer*, L. R. 5 Eq. 527, on the ground that this last case had unusual facts. All the decisions were those of Courts of first instance and do not seem to have involved the Judge in protracted reasoning, but this is natural enough because the section in question conferred upon the Court a power to make a vesting order, and it was obviously beneficial and the intention that the words should be construed as widely as possible.

Nevertheless *Re Greenwood's Trusts* (*supra*) does tend to show that there is some doubt whether Part III or Part IV does apply. The words "but not so as to sever *any* joint tenancy in the proceeds of sale" in Part III, paragraph 2, might mean that there need not necessarily be a joint tenancy in the proceeds of sale. Nevertheless, the tendency throughout the legislation to deal separately with joint tenancy and undivided shares seems to render it not unlikely that such a construction would not be accepted, but on the other hand why did not the draftsman say "in an infant and one or more other persons of full age as joint tenants" ?

In any event we suggest that sufficient doubt arises to make it desirable to get the best of both worlds and avoid the problem of the possibility of an outstanding legal estate. It seems clear that either Part III, paragraph 2, or Part IV, paragraph 1 (4) must apply, and that in either case a trust for sale is created to which indubitably a new trustee should be appointed. If the infant is of full age then he should be appointed a new trustee, and after this lapse of time the infant will be of full age in nearly every case. For this simple case we give a precedent elsewhere (*post*, p. 290). Different circumstances may require some variations, but the principle seems obvious. If Part III, paragraph 2 applies, then the legal estate is vested in the other person of full age and either he or his personal representatives must appoint, and if Part IV, paragraph 1 (4) applies the legal estate is vested in the Public Trustee and he must be displaced by the United efforts of the other person and the infant (now become of full age). The result is not an attractive document, but it seems inevitably to vest the legal estate where it is wanted.

Mortgages by limited companies—Treasury consent.—The obligation to obtain Treasury consent before the issue of securities by any person, formerly limited to issues of £10,000 in any one year, has now been extended by Capital Issues Exemption Order, 1944 (S. R. & O., 1944, No. 1269) to *all* issues by limited companies whatever the amount where such company is incorporated after December 1, 1944. Actually the wording is "to any company within the meaning of the Companies Act, 1929, or any corresponding enactment in force in Northern Ireland", which is, of course, rather wider than limited companies, since it means any company registered under the Companies Act, 1929, s. 380 (1) and, of course, a North Irish company.

With the economic and political purposes of this provision we are not concerned, but in any material case of a mortgage of a company we must now insert the requisition whether such consent was obtained and the abstract should show the date of registration of the company to make it clear whether the Order applies.

Requisitioned Land and War Works Bill.—Attention may be drawn to this Bill from the point of view of drafting contracts and possibly conveyances. Without knowing the exact terms in which the Bill may

become law it is difficult to forecast any terms appropriate to contract, if, indeed, any be needed. In contracts it is always wise to be on the safe side, and, if possible, foresee difficulties. The point is that there are now taking place sales of factories and other properties requisitioned by His Majesty's Government. In many cases these properties have been altered and increased in value for adaptation to war purposes. In so far as such alterations and increases are fixtures, and normally many of them are, the additions adhere to the freehold and pass with it. At the same time it is apparent from this Bill that the Government does not propose necessarily to make a present of the improvements to the freeholder. It is suggested that on such a sale of requisitioned land the vendor would be wise to disclose the state of the property prior to requisition (this can be done by reference to the Schedule of Condition which accompanies the taking over by the Department) and to make the sale subject to any claim by His Majesty's Government or any Government Department or any person claiming by, through or under them or any of them in respect of any additions, etc. It is important to remember that the claim may come into existence by future enactment. Probably, if the *facts* were fully known to the purchaser, he could not in any case complain of any enactment which changed the existing law, but there can be no objection to providing against the possibility of any such claim by a purchaser. Clearly free disclosure of the position prior to requisition is most important.

Leases of business premises.—In the Law Society's *Gazette* (December, 1944, p. 194), the Council draw attention to the importance of seeing that where a solicitor is acting for both parties he does not obtain the execution of a lease of business premises before a licence under the Location of Retail Businesses Order, 1942. As is pointed out in the note in the *Gazette*, if this point is not attended to the lessee may be left with premises on his hands which are valueless to him owing to the licence being refused. Of course an alternative is to provide that the lessee can determine the premises within (say) six months of the demise if the licence is not granted within that time. Since it is obviously to the advantage of the lessee to obtain the licence so soon as possible it does not seem that any objection could arise from either party to such a term in the lease.

The problem of controls and licences appears to us to be one of the most difficult in everyday conveyancing. No doubt the unco-ordinated or apparently unco-ordinated and unclassifiable character of such licences and controls is an inevitable concomitant of war-time controls, but we cannot help feeling that something might be done to reduce them to order. No doubt man-power shortage will be the answer, the man power being more needed to produce fresh control orders.

I am sure that all subscribers would wish to congratulate Mr. D. C. L. Cree upon a "double event". This issue completes a jubilee in his Editorship of the *Conveyancer* since he took over from

his father, Mr. C. E. Cree, in March of 1920. In the Admiralty's list of the New Year's Honours, Mr. Cree was mentioned in dispatches for his sea service during this war. No doubt many, if not all, subscribers noticed that when, on August 6, 1941, after the presentation of the Blue Water Medal of the Cruising Club of America to the yachtsmen of England for their work in the little ships at Dunkirk, the story of the medal and the citation was broadcast it was Mr. Cree's voice that we heard. Equally no doubt when later exploits can be told we shall hear more and in the meantime it is a real pleasure to record some measure of recognition for his service.

H. P.

QUASI-CHARITIES.

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(Concluded.)

In framing provisions for "quasi-charities" the prophylactics against the perils which attach to such designs must be carefully and steadily kept in view. It will be realised that a pre-requisite is the decision as to whether the project or entity intended to become the beneficiary is a true charity in the legal sense of the term or a "quasi-charity". The decided cases will afford guidance as regards clear instances but the difficulty arises in respect of those on the borderland. "Safety first" is a motto which has at present lost some of its favour, but there are occasions when its bidding may well be borne in mind, and it would seem that in these borderland instances the conveyancer adopts a prudent course when, taking no risks, the draft is framed on the footing of the entity being in the category of a "quasi-charity".

The general directions to be observed in framing provisions in trust for "quasi-charities" have been most aptly set forth in Sir Lancelot Elphinstone's invaluable *Conveyancers' Year Book* for 1940, at p. 40, wherein it is observed that "if the legatee is not a charity in the legal sense, the bequest must be either to the legatee absolutely so as to vest at once, or on trusts framed so as to be within the perpetuity period. If this is not done the bequest will be void. Moreover, non-charitable trusts must be defined with sufficient precision to enable them to be ascertained. If this is not done, the trusts will be void for uncertainty" (citing *Farley v. Westminster Bank*, [1939] A. C. 430, where a gift for "parish work" was held void, as being neither charitable nor capable of ascertainment with sufficient precision). From this statement the pitfalls against which the conveyancer must be guarded can be readily visualised. How are the difficulties to be overcome or circumvented? The "tombstone" cases afford useful illustrations for guidance in both the positive and negative senses, for it is settled law that a trust for the repair of a particular monument or vault or tomb is not "charitable" unless it forms part of the fabric or ornament of a church (see *Hoare v. Osborne*, L. R. 1 Eq. 585; *Re Rigley*, 36 L. J. Ch. 147; *Re Rogerson*, [1901]

1 Ch. 715, and *Re King*, [1923] 2 Ch. 243). *Re Tyler*, [1891] 3 Ch. 252, stabilised for a considerable time the conveyancing practice of giving a fund to one charity on condition that it keeps the tomb in repair and upon breach of the condition providing for a gift over to another charity. This is in fact not strictly a case of trust at all. It is a gift to X on a condition that X does something, not necessarily with the income derived from the gift but if thought fit from other sources (a). So long as the task is discharged the gift belongs to X. If it ceases to be discharged the gift goes over to Y, another charity. But the non-charitable object remains a beneficiary so long as X feels it expedient (or as the case may be) to carry out the obligation. The obligation is more in the nature of an implied contract (see *Gregg v. Coates*, *Hodgson v. Coates*, 23 Beav. 33, at p. 38, and *Re Loom*, [1910] 2 Ch. 230). It is obvious that in practice the sum given to charity X must be worth its while to accept in order to induce it to carry out the obligation, and would seem to necessitate a larger sum than the obligation involves (b). The use of the device in *Re Tyler* seems therefore limited in scope. Although widely adopted by conveyancers, it has been criticised by the late Mr. Charles Sweet in the *Juridical Review* for July, 1906, wherein the learned editor of the 6th edition of *Jarman on Wills* declared it to be contrary to principle, and the decision based on a misapprehension of *Christ's Hospital v. Grainger*, 1 Mac. & G. 460. In *Re Chardon*, [1928] Ch. 464, a gift upon trust to invest a sum of money the income to be paid to a cemetery company so long as certain graves were retained in good order and condition, with a gift over of the income in accordance with the residuary clauses, was held to be valid. By reason of its vesting within the perpetuity period it was within the modern rule against perpetuities, and the interest of the cemetery company was not inalienable, and therefore did not infringe the old rule, since the residuary beneficiaries had a vested interest. The bequest in favour of the cemetery company was not one on condition, but a conditional limitation. The residuary beneficiaries and the cemetery company were together the beneficial owners of the fund in such a way that they could, as between themselves, dispose of the fund. For a comprehensive review of the problems raised by *Re Chardon* the reader is referred to the learned survey by Mr. W. O. Hart entitled "Some reflections on *Re Chardon*" (1937), 53 L. Q. R. 24, and an acute analysis of the case by J. A. P. appeared in 3 *Cambridge Law Review* 463 (1929); see also the Appendix to *Tudor on Charities*, 5th ed., where the case is discussed. The principle of *Re Chardon* may be thus shortly stated: A gift of income in favour of a "quasi-charity" is valid so long as it is in the nature of a determinable interest with "reversion" to residue or as on an intestacy, as the case may be (see also *Re Randell*, 38 Ch. D. 213, and *Re Talbot*, [1933] Ch. 895). The method of *Re Chardon* affords an alternative

(a) The practice of conveyancers as to the source of income for the purpose varies. In *The Conveyancer*, old series, vol. 3, pp. 559—561, the income of the trust fund is made the source. In *Key & Elphinstone's Precedents* and in *Prideaux's Precedents* there is no mention of the source of income for the purpose. (See *K. & E.*, 14th ed., vol. 2, pp. 862—863, and *Prideaux*, 23rd ed., pp. 720—721.) The precedent in the *Encyclopædia of Forms and Precedents*, 2nd ed., vol. 3, p. 141, makes the source for the purpose "otherwise than out of the income of the trust fund".

(b) See *Bailey, Law of Wills*, 2nd ed., p. 63.

device to that adopted in *Re Tyler (supra)*, but in practice its range seems equally limited. The subject emerged again in *Re Dalziel*, [1943] 2 A. E. R. 656. In that case a testatrix gave a sum of £20,000 to the governors of a hospital to be added to an existing fund but subject to the condition that the income arising from the gift should be used, as far as necessary, for the upkeep of a mausoleum which, together with the garden surrounding it, had to be kept in repair and, if necessary, the mausoleum was to be rebuilt. Upon non-compliance with the condition the sum was to go to such charities as the trustees of the will should select. The existing fund was not wholly applicable to charitable purposes. Cohen, J., held that since the gift was to be added to a gift which itself was not wholly applicable to charitable purposes the gift failed and the gift over to selected charities failed with it. It will be noted that in *Re Tyler (supra)* there was no gift of income for a non-charitable object, while in *Re Dalziel* the gift was a direct gift of income for a purpose clearly of a non-charitable nature. It is this aspect of the case which is of more immediate concern in considering the methods to be adopted in framing provisions for non-charitable purposes than the expressed *ratio decidendi* in *Re Dalziel*, a case which at the outset was complicated by the fact that the fund given by the testatrix was to be added to a fund already not wholly devoted to charitable purposes.

It is probable that the best guide to the framing of provisions in favour of a "quasi-charity" (if the settlors are prepared to provide for the certain endurance of the project no longer than the termination of the perpetuity period, at which point a reconstruction of the project will become imperative) is to be found in the precedents of superannuation and pension schemes prior to the coming into operation of the Superannuation and other Trust Funds (Validation) Act, 1927, the effect of which is to exempt trusts having as their object superannuation schemes in general from the restriction imposed by the rule against perpetuities. Prior to the passing of that Act superannuation and pension schemes were not regarded as, legally speaking, charitable (see *Carr v. Long*, 2 De G. F. & J. 75, and *Re Amos*, [1891] 3 Ch. 159. In *Re The Telegraph Construction and Maintenance Co., Lucas v. The Company*, an unreported case, it was held that a trust establishing a pension scheme unrestricted in respect of duration was void—*L. J. Newsp.*, Jan. 31, 1925, Vol. 60, p. 105). A curious state of affairs existed after the coming into operation of the Finance Act, 1921, which, subject to certain conditions, relieved investments on behalf of such funds from income tax. To qualify for such relief the Inland Revenue Commissioners made it imperative to include a clause in the trust deed restricting the operation of the scheme within the perpetuity period. However, once such a scheme had been established it was in law incurable by the mere insertion, *post hoc*, of a restricting clause. In practice it is believed that the Inland Revenue Commissioners were prepared to regard such an addition as validating the scheme, subject to the consent of all the persons concerned in respect of the fund. Until, therefore, the 1927 Act operated there must have been large numbers of such trusts of very doubtful legal validity. On the other hand there were considerable numbers framed to meet the difficulties caused by the perpetuity

rule, and many provided that at the expiration of twenty-one years from the death of the survivor of all the lineal descendants of His late Majesty King Edward VII now living the trusts should thereupon determine, and upon the determination thereof and the conversion of trust funds into money and the due discharge of all obligations then existent, the trustees were to purchase annuities or *make other provision* for beneficiaries entitled in anticipation to pensions out of the fund. In practice the situation placed the responsibility upon the trustees of creating a new trust on the expiration of the old one. Such a method, *mutatis mutandis*, can be made applicable to any form of "quasi-charity", always bearing in mind that reliance will have to be placed upon the probability of reconstruction at the expiration of the old trust, a probability which is of course not equivalent to certainty. The funds at that stage will have to go somewhere, but any provision of a mandatory character, which will automatically continue the trusts, will invalidate the original scheme (see generally *Braithwaite v. Att-Gen.*, [1909] 1 Ch. 510, and *Re Clarke*, *supra*).

An alternative method is to be found in volume 14 of *The Conveyancer*, old series, p. 5, in which there is a valuable note explanatory of the scheme embodied in the precedent. The scheme is shortly stated in the headings of the precedent which show that it is a settlement by way of renewable trusts of proceeds of sale of freeholds and stocks and money intended to be devoted to religious or charitable purposes, but to remain private property, and it is this last qualifying phrase which makes the precedent particularly applicable to "quasi-charities". As the note observes (pp. 5 and 6) the scheme ensures "that the property should be devoted to the objects of the particular community or association by permission of the persons beneficially interested under the trusts. The user of the property for the contemplated purposes, being merely permissive, could not of course give rise to any legal right by prescription or otherwise. The scheme seems calculated to work satisfactorily, and to be capable of extensive application. The object in view is attained by vesting an overriding power of appointment in a sufficiently numerous body of persons composed of members or friends of the community. The trust being a private one, and not charitable, must be kept within the limits of . . . the rule against perpetuities, and will require renewal from time to time. . . . The trust will be renewed as often as may be thought desirable by the execution under the power of appointment of a precisely similar declaration of trust *mutatis mutandis* so that the ultimate trust will never take possession". Reference must be made to the precedent to visualise the full working of the scheme, but the probability of enduring effectuation seems greater thereunder than under any other system within the ambit of the rule against perpetuities. (For a precedent of the first type see *The Conveyancer*, old series, vol. 13, p. 595 *et seq.*, but see now *Re Villar*, [1929] 1 Ch. 243, and *Re Vaux*, [1939] Ch. 465, and the article "A life in being for the purposes of the Rule against Perpetuities", by Mr. A. K. R. Kiralfy, in *The Conveyancer and Property Lawyer*, new series, vol. 6, p. 191, also vol. 17 of the 2nd edition of the *Encyclopædia of Forms and Precedents*, clause 21, at p. 374. The precedent above referred to of the alternative type in

vol. 14 of *The Conveyancer*, old series, is reproduced, together with the note, in Key & Elphinstone's *Precedents*, 14th ed., vol. 2, p. 318.) The number of instances in which testators have designed schemes in the belief that such schemes would prove to be regarded as charitable but on being judicially tested have been declared what is virtually merely "quasi-charitable" is so considerable that the possibility of being in the latter category with all its perils should be constantly before the eyes of the draftsman, except in the clearest cases of pure charities. A review of some recent cases involving the problem, by the present writer, appeared in the Annual Charities Review of the *Law Journal* for 1944 (April 22, 1944 supplement, pp. 16—20), and the prophylactic provision as regards perpetuities was discussed in an article from the same pen entitled "Some Conveyancing Aspects of Perpetuities" in the *Law Journal*, August 28, 1943, vol. 93, p. 275 (c). In drafting provisions with such a clause as a protective measure the main difficulty will be found to be in the framing of the directions as to the trust funds at the point of the expiration of the period. Great care will be necessary to prevent too much precision resulting in the imposition of a trust, an element which would invalidate the whole deed. It is submitted that something in the nature of a precatory expression in favour of the reconstruction of the trust would be admissible and indicative of the *wishes* of the founders short of an imperative trust (d), but it would be safer to add thereto a proviso making it perfectly clear that no trust is thereby imposed (see *Re Pitt-Rivers*, [1902] 1 Ch. 403). The question of an authentic categorisation of "quasi-charities" is one which is ripe for consideration by the Law Revision Committee, and an amendment might well allow the application of the principle of exemption thereto in respect of the perpetuity rule, as adopted in the 1927 Act above referred to. In the meantime prophylaxis is the only means, until a change of the law, whereby the benefactors of "quasi-charities" can hope to make possible the realisation of their wishes (e).

REDEMPTION OF BUILDING SOCIETY MORTGAGES.

The Law Society's *Gazette* for October, 1944, at p. 167, reinforces the opinion expressed in the June number that solicitors should not be asked to accept the undertakings of building society solicitors in place of the receipted mortgage. In view of the repeated complaints received by the Council of the continuance of the practice the Council have now expressed their opinion more fully.

The following considerations seemed relevant to the Council.

(c) See *Re Leverhulme*, [1943] 2 A. E. R. 143, considered at length in the *Law Journal*, September 11, 1943, vol. 93, p. 295 ("The Legal Status of a Staff College—is it a 'Charity'?", by the present writer.)

(d) Such a method was adopted as regards a provision for the repair of a tomb in Sweet's Concise Precedents (4th ed., 1886), at p. 1204. At that time the method employed in *Re Tyler* (*supra*), decided some five years later, had not obtained general currency.

(e) *Re Dupree's Deed Trust, Daley v. Lloyds Bank, Ltd.*, referred to in the first part of this article (*supra*, p. 68) is now reported in [1944] 2 A. E. R. 443, as also in 61 T. L. R. 50.

1. The mortgagor is entitled to the mortgage deed duly discharged on the occasion of making the payment.

2. Where the mortgagor is selling his title is incomplete until the mortgage is discharged, and if the purchaser has to accept only an undertaking he may be unable to deal with the property for several days after completion. In fact the vendor has not properly fulfilled his contract.

3. If the undertaking is given by the society's solicitors and not by the society the solicitors are promising something of which they cannot compel performance.

4. If the purchaser's solicitors accept such an undertaking without the express authority of *their client* they might well incur liability for negligence if for any reason the discharged mortgage failed to reach them. The purchaser's solicitor should not be asked to take this additional responsibility which is involved in allowing the purchaser's money to be employed in paying off the vendor's mortgage.

The Council then go on to point out that the objection that the discharge may never be completed if sealed before the date of completion is more apparent than real. Both under section 115 (1) of the Law of Property Act, 1925, and section 42 of the Building Societies Act, 1874 (see L. P. A., s. 115 (9)), the statutory receipt need not be endorsed upon but can be annexed to the mortgage. Furthermore, the payment of mortgage moneys on discharge is one of the conditions expressly cited in Halsbury's *Laws of England* (see vol. x, para. 243) as examples of the conditions upon which a deed may be delivered in escrow.

These arguments are in themselves sufficiently cogent, we should hope, to ensure that building societies will comply with the obvious desire both of the Council and many members of the profession. Nevertheless we may offer the following observations. Notwithstanding some ancient authority a document executed in a form absolute will operate only as an escrow if on the evidence it may be reasonably inferred that it was delivered not to take effect as a deed until a condition was fulfilled. Baron Parke in *Bowker v. Burdekin* (1843), 11 M. & W. 128, at p. 147, laid down the law thus: "You are to look at all the facts attending the execution, to all that took place at the time and to the result of the transaction, and, therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow": cf. *Governors, etc., of the Foundling Hospital v. Crane*, [1911] 2 K. B. 367. Although a document is delivered to one of the mortgagors it was said that evidence could be admitted to show that the terms upon which the delivery was made were such as to constitute it an escrow, *per* Lindley, L.J., in *London Freehold, etc., Co. v. Suffield*, [1897] 2 Ch. 608, at p. 621, though in the instant case it was held that the delivery was absolute. The delivery of a transfer of mortgage was held to be as an escrow until the mortgage money was paid: *Griffin v. Clowes* (1854), 20 Beav. 61; and so was a conveyance until payment of the purchase price: *Phillips v. Edwards* (1864), 33 Beav. 440, at p. 446. Since obviously evidence can be given that at the date of sealing the receipt the mortgage money had not been paid and that the delivery was not made to the mortgagor, it would seem

clear enough that normally no question could seriously arise but that delivery was as an escrow dependent upon payment of the mortgage money. In practice and apart from the case of building society receipts, practitioners rely upon this law to enable them to obtain execution of conveyances, mortgages and reconveyances some time before actual completion. The old-fashioned practice of requiring the attendance of parties at completions for the purpose of executing deeds and receiving moneys paid would impose many inconveniences.

The consequence of these rules is that in the event of the completion not taking place the building society would not only retain the deeds, which would safeguard their security in the ordinary way, but would also retain the full benefit of all legal estates or interests vested in them under the mortgage.

To the Council's view that a purchaser's solicitor should not be obliged to undertake the additional responsibility of accepting an undertaking, which, as the Council points out, might be incapable of being enforced by the person giving it, we might add some hesitation as requiring the payment of money to the society's solicitors without the production of a deed containing a receipt or an express authority from the society authorising the payment to the solicitors. Section 69 of the Law of Property Act, 1925, is in fact much narrower in scope than the reliance placed upon it would suggest. This section authorises payment to a solicitor and no one else: see *Sparling v. Brereton*, L. R. 2 Eq. 64; and the solicitor must be the solicitor of the person capable of giving the discharge: *Day v. Woolwich, etc., Society*, 40 Ch. D. 491; *King v. Smith*, [1900] 2 Ch. 425. If the money is paid on an undertaking it does not seem that short of express authorisation by the society there would be any protection if anything went wrong. Although the chances of such a mishap may be infinitesimal there seems to be no justification for requiring an unnecessary responsibility to be incurred.

What is, perhaps, the most interesting point which arises has not unnaturally been omitted. The unwillingness to execute the receipt is probably due in some measure to the law prior to 1926. Then the reconveyance was a very important document not merely as the record of a transaction but also as an operative conveyance. The legal estate remained with the mortgagee notwithstanding the repayment of the mortgage money until either the legal estate was reconveyed or the person in possession acquired a title thereto under the Limitation Acts. Notwithstanding section 115 of the Law of Property Act the old law seems to be no longer applicable. Under section 116 it is provided that without prejudice to the right of certain persons to keep a mortgage term alive a mortgage term shall, when the money secured by the mortgage has been discharged, become a satisfied term and shall cease. This section, of course, replaces the old Satisfied Terms Act, 1845, which is repealed, but it is submitted that there is nothing in the section which limits its application to terms created in settlements. Consequently it is not necessary to have a receipt under section 115 to get rid of the mortgage term, as it was formerly necessary to have a reconveyance of the legal estate in fee simple or as the case might be. If the mortgage is created as a charge by way of legal mortgage it would seem to be even less necessary for the purpose of discharging whatever legal estate or interest is created. The chargee by way of legal mortgage would hardly

appear to have an interest capable of surviving the payment off of the loan, since in such a case he could have no right to possession or to realise his security : see section 87.

If this view of sections 116 and 115 is correct then it is not material to have a receipt in the form required by section 115 to get rid of the estate or interest of the mortgagee. It will be necessary only to prove that the mortgage moneys and interest have been paid. Consequently a proper receipt could be relied upon for the time being, though no doubt a receipt in the proper statutory form should be provided for convenience. The only difficulty, therefore, that relates to the usual undertaking is that it is not expressed sufficiently clearly as a receipt for principal and interest and, *perhaps*, that the solicitors giving it have no authority to give such receipts. Both these difficulties could be overcome. On this view of the law it might be possible to satisfy both the building societies and the solicitors for mortgagors or purchasers! And we are left wondering why we should in the ordinary (not building society) case continue to pay reconveyance duty under section 115 (5).

Nevertheless we may conclude with a passage from the judgment of Swinfen Eady, M.R., in *Graham v. Seal*, 88 L. J. Ch. 31, at p. 35 : "The obligation of the mortgagee is, as against payment of what is due to him, to reconvey and deliver up the deeds of the mortgaged premises . . . so in the paying off of a mortgage a mortgagee is not entitled to insist upon payment of the mortgage with a view to his reconveying at some future time"; and the learned Master of the Rolls compared this with the position of vendor and purchaser, neither of whom should be at risk at any time without money or estate. Nor can we see that building societies are privileged in this respect as against any other mortgagees.

IRREVOCABLE LICENCES.

Thompson v. Park, [1944] 2 A. E. R. 477, is of considerable interest on two grounds, first, because the Court of Appeal overruled the refusal of the Judge of first instance to grant an interim injunction, and secondly, because it illustrates the importance between licences and tenancies notwithstanding the decision in *Hurst v. Picture Theatres*, [1915] 1 K. B. 1, and emphasises the ground for that decision, though it is not actually mentioned in the report of *Thompson v. Park*, *supra*.

Inevitably the facts are somewhat complicated, but it would appear to be sufficient to say that one evacuated preparatory school headmaster took a lease of certain premises. He then entered into an agreement with another preparatory schoolmaster : "for internal purposes, *e.g.*, work and games the schools shall function as one; but for external purposes, *e.g.*, parents, 'X School' shall retain its separate entity and collect its own fees". The agreement was to last for the duration of the war with a minimum of three years. There were ancillary clauses for buying out the lessee after the expiration of the agreement.

The lessee, who was plaintiff in the action, disagreed with the defendant and gave him notice determining the agreement. After some

difficulties the defendant still did not leave and after considerable forbearance the plaintiff moved the defendant's furniture to an outhouse and barred the house against him. The defendant then forcibly entered the premises.

These proceedings were interlocutory to obtain an injunction preceding judgment, and the question before the Court did not decide the main issue, namely, whether the plaintiff was entitled to damages for trespass. The Court of Appeal (Goddard and du Parc, L.J.J.) held that as there was no doubt that the forcible entry was unlawful they should grant an interim injunction, though in the final result of the action it might be shown that the plaintiff should not have forbidden the entry.

In order to hold as they did the Court of Appeal were bound to decide and seem to have decided two questions, first that the right of the defendant on the premises constituted a licence only, and secondly, that a licence though for valuable consideration may be revoked unless it is capable of specific performance: adopting the passage on the common law position of licences from *Salmond on Torts* (9th ed.), at p. 258, without definitely referring to the following paragraph dealing with *Hurst v. Picture Theatres, Ltd.*, *supra*, which concludes: "It does not clearly appear, however, from the observations of the Court of Appeal in *Hurst v. Picture Theatres, Ltd.*, whether even to this extent [to the extent that the licence must be specifically enforceable] the rule in *Wood v. Leadbitter* is to be regarded as still in force". Actually earlier passages in the judgment of Goddard, L.J. (at p. 479) imply that this aspect of the matter had been considered and the Court were of opinion that the common law rule did apply to the revocation of licences unless the contract was specifically enforceable. The whole of the judgments proceed upon the footing that this agreement constituted only a licence and no greater interest in land. It was also in fact assumed for the purposes of the decision that the defendant was right in his claim that the contract had not lawfully terminated. Consequently this case is of considerable importance on the position of licences notwithstanding that it is an interlocutory appeal.

The forcible entry was, so far as it was a forcible entry on land, illegal and criminal as contrary to the Statutes of Forcible Entry, 5 Ric. 2, c. 7, referred to in the judgment of Goddard, L.J., but this of itself does not ground an action if the forcible entry was with intent to recover lawful possession and no more force was used than was reasonably necessary: *Hemming v. Stoke Poges Golf Club*, [1920] 1 K. B. 720, though forcible re-entry without right to possession would be wrongful and, indeed, would not confer possession on the wrongful entrant in such circumstances: see *Browne v. Dawson* (1840), 12 A. & E. 624, where a dismissed schoolmaster forcibly re-entered as against the trustees. Consequently to justify the interim injunction it would seem that the Court must have held that the right to enter under the licence had gone whether or not the contract had been broken wrongfully.

In these circumstances it is relevant to observe what happened in *Hurst v. Picture Theatres, Ltd.*, *supra*. *Wood v. Leadbitter* (1845), 13 M. & W. 838, decided that a ticket to go on a racecourse constituted a licence; it was not under seal, and could be revoked at any time notwithstanding that it amounted to a breach of contract and, if revoked,

the occupier of the racecourse could use force to remove the *quondam* licensee. *Hurst v. Picture Theatres, supra*, held that a licensee under a ticket to enter a building and see a spectacle from its commencement until its termination could not be revoked and the licensee ejected from his seat, because *Wood v. Leadbitter, supra*, had ceased to be effective since the Judicature Act. To arrive at this conclusion Buckley, L.J., assisted his reasoning by referring in particular to *Frogley v. Earl of Lovelace* (1859), John. 333, where a written agreement had reserved the exclusive sporting rights over land for twenty-one years, and the Court of Chancery distinguished *Wood v. Leadbitter, supra*, on the ground that in equity the want of a seal necessary to complete the grant would not defeat specific performance, and in the meantime an injunction to prevent interference. Similarly, the learned Judge relied upon Parker, J., in *Jones v. Earl of Tankerville*, [1909] 2 Ch. 440, which protected a licence by injunction because absence of a seal could not be pleaded. It is not clear whether the right to enter the building and sit in the seat was primarily to be regarded as the interest to be safeguarded by a seal or the right to see the spectacle, but it is submitted with respect that the judgment was wide enough to cover something different, namely, that a licence for valuable consideration that expressly or impliedly contained an agreement not to revoke it is an enforceable right and must be protected.

On the other hand, *Thompson v. Park, supra*, breaks in upon this and says that at least some such licences are not enforceable. In the words of Goddard, L.J. (at p. 479): “. . . but it seems to me that from the outset he [the defendant] or his advisers should have realised, as perhaps they did, that this is not the sort of agreement which any Court could specifically enforce. You cannot specifically enforce an agreement for two people to live peaceably under the same roof. It is an impossibility, and I do not believe for one moment that any Court would consider that this was a class of agreement fit for the remedy of specific performance. . . .” Hence this view puts licences into two classes where they are expressly or impliedly subject to an agreement not to revoke. Licences are either (i) specifically enforceable, and (ii) not specifically enforceable.

Accepting this view we must revert to the law before *Hurst v. Picture Theatres, Ltd., supra*. *Frogley v. Earl of Lovelace, supra*, surely turned upon the rule that at common law an imperfect grant of a profit because there was no seal constituted a licence and no more. It is true that in that case *Wood v. Leadbitter, supra*, is cited (at p. 339) as deciding that a seal was necessary to substantiate a claim to a right of sporting for twenty-one years, but it has not, we think, been doubted that sporting rights can subsist as something more than a licence and, indeed, is a profit *à prendre*: *Lowe v. Adams*, [1901] 2 Ch. 598. On the other hand the right to see a spectacle, whether a horse or a cinema show, cannot, it is thought, be either a profit or an easement. In *Jones v. Tankerville, supra*, Parker, J., said that a licence could be irrevocable even though in aid of a legal right which was not realty, namely, to carry away felled timber (see at p. 443). But in the case presumed by Parker, J., the timber would not be removable without the licence. It is doubted whether a right to see a spectacle is so definite as a right to timber, and what is more it is possible to get specific performance of a

contract for sale, though the right is limited. It is not equally clear why specific performance of a contract to view a spectacle should be given, any more than a contract to use premises. Of course in the instant case the contract was something more than a contract for permission to use premises.

The importance, then, of this new decision is not to throw doubt on the validity of *Hurst v. Picture Theatres*, *supra*, which, indeed, it cannot very well do being a decision of the same Court, but to emphasise that there are limitations to the application of that case. *Thompson v. Park*, *supra*, rather shifts the burden of the problem to determining what contracts to grant licences will in fact be enforceable specifically. It is thought that now the issue has been raised clearly more will be heard of the problem in the near future.

One point, however, may be mentioned at once. The old law was clearly that a licensee, whatever his rights against the licensor, could not enforce it against a third party, because the licensee had no interest in the land : *Hill v. Tupper* (1863), 2 H. & C. 121. This would include, apparently, persons who acquire the property from the licensor : see *Clore v. Theatrical Properties*, [1936] 3 A. E. R. 483. But if a contract is specifically enforceable it is difficult to see why the licence could only be enforceable against the original contracting party, assuming of course that there was appropriate notice or registration under the Land Charges Act. It may be that the licences only enforceable against the licensor are to be distinguishable from those in which specific performance could be granted, *e.g.*, where the use of the premises is such that specific performance or injunction would be inappropriate.

From this necessarily inconclusive discussion one practical conveyancing point emerges. It is more than ever necessary when licences are granted to make clear that (i) a licence only is being conferred upon the party, and (ii) the limits within which the licence shall operate. It is to be borne in mind that the types of licence granted nowadays are very various—licences to put up advertisements : see *King v. David Allen*, [1916] 2 A. C. 54; to take and carry away timber : *Ellis v. Noakes*, [1932] 2 Ch. 98 n.; as well as licences to use premises, *e.g.*, as a bar for supplying refreshment : *Frank Warr v. L. C. C.*, [1904] 1 K. B. 713; *Clore v. Theatrical Properties*, *supra*, as well as many licences in connection with mines and sporting rights. Not a few of these may be capable also of taking effect as either tenancies or grants of easements or profits; it is, therefore, most material to determine quite clearly exactly what is intended between the parties.

THE TOWN AND COUNTRY PLANNING ACT, 1944, AND THE PROPERTY OWNER.

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I. Introduction.

The Town and Country Planning Bill, 1944, comprising *fifty clauses and seven schedules* was introduced into the House of Commons on June 20, 1944. After an eventful passage through the Commons and the Lords, it eventually received the Royal Assent on November 17, 1944, as the Town and Country Planning Act, 1944, comprising *sixty-six sections and eight schedules*. It came into operation forthwith.

Those who have to construe the provisions of this exceedingly intricate enactment, whether on behalf of local authorities or of private individuals, may be interested in some of the remarks which it evoked from the Legislature as it progressed through Parliament.

In the House of Commons the Parliamentary Secretary to the Ministry of Town and Country Planning (Mr. Henry Strauss, M.P.) candidly declared, "this is, admittedly, a difficult Bill". The member for Ilford (Mr. Geoffrey Hutchinson, M.P.) found it "a very complicated Bill", and whilst, for reasons which the author of this article does not appreciate, he would not go so far as to say that there were hon. Members of the Commons who did not understand the Bill, he was quite sure that "there are a great many people outside this House who do not understand it at all". In the House of Lords the Minister of Reconstruction (Lord Woolton) observed that "The jargon to which this Town and Country Planning Bill is leading us is most unfortunate and I am sorry to have fallen into it", and Lord Addison remarked: "I have read this Bill and have done my best to understand some parts of it. I do not pretend to say that I have succeeded, but I have tried". The Earl of Portsmouth, "having tried not only to read but to understand this Bill and having listened to Honourable and Learned Lords throughout the second reading", went on to say that it seemed to him "that the whole Bill is designed so that both landlords and local authorities should be butchered to make a lawyer's holiday", whilst the Lord Chancellor (Viscount Simon) was, apparently, entirely at one with the Parliamentary Secretary to the Ministry of Town and Country Planning, for he permitted himself the unqualified observation, "This is certainly a difficult Bill to follow".

The foregoing remarks (all of which can be found in the appropriate columns of Hansard) by those who are responsible for this enactment reaching the Statute Book in its present form, have been deliberately set out here for the comfort and encouragement of those who will have the task of construing this Act and who find (as well they may) that their task is not a happy one. The fact is that this enactment is going to affect drastically both local authorities and private individuals whether they like it or not and, what is perhaps more important, *whether they understand it or not!* In this article the Act is examined from the point of view of the private property owner and an effort is made to pick out those portions of the Act which will

be most likely to affect him. It must be emphasised that the article does not pretend to be in any way an exhaustive statement of the provisions of this long and complicated enactment. Such is not possible in the space available nor is it, from the property owner's point of view, necessary.

II. *Land Acquisition.*

Notwithstanding its title the major portion of this Act deals not with planning but with land acquisition. New powers of acquiring land compulsorily for a variety of purposes, and by a very much speedier method of procedure than has hitherto been possible, are conferred upon local authorities. As these powers are as important from the property owner's point of view as from the local authority's (for it is the property owner's land which is going to be acquired), it is proposed to review them briefly in the following paragraphs.

(1) AREAS OF EXTENSIVE WAR DAMAGE.

On the application of a local planning authority the Minister of Town and Country Planning (in this article referred to as "the Minister") may now make an Order (in this article termed a "Designation Order", though the expression is entirely unofficial and does not appear in the Act) declaring areas of extensive war damage as being subject to compulsory purchase (section 1 (1)). An "area of extensive war damage" means an area comprising land which has sustained "war damage" (as defined in section 2 of the War Damage Act, 1943), with or without additional undamaged land contiguous or adjacent to the war-damaged land, which area the Minister is satisfied should, for the purpose of dealing satisfactorily with extensive war damage, be laid out afresh and redeveloped as a whole. The application for the Designation Order must be made before the expiration of *five years* from a date yet to be appointed by the Minister as being the date when the making of such applications has become practicable. An authority can, however, apply at once for a Designation Order if they are ready to do so and need not wait for the appointed date.

An area of extensive war damage will generally be an area in which congestion formerly existed and its redevelopment on sound planning lines will cause an overspill both of population and of industry which, it will be found, cannot be reaccommodated in the area and which will, in consequence, have to be re-located elsewhere. The redevelopment of such an area may also necessitate the building up of open space which, it may be felt, would be better sited elsewhere. Accordingly, a local planning authority can apply to the Minister, before the expiration of the five-year period previously mentioned, for a Designation Order in respect of *any* land (whether within or outside their own boundaries) required for the re-location of population or industry or for the replacement of open space (or, to put it briefly, required for *overspill*) consequent upon the redevelopment of an area of extensive war damage (section 1 (2)).

An application to the Minister for a Designation Order must be advertised both in the "London Gazette" and in the local press (section 1 (7)) and objections to the making of the Order can be lodged with the Minister. The Minister must consider any objection

duly made and not withdrawn (First Schedule, para. 2) and having done so may, in certain circumstances, treat the objection as irrelevant (First Schedule, para. 3). If the Minister does not treat the objection as irrelevant he may nevertheless determine the objection without further investigation, *i.e.*, without giving the objector an opportunity of verbally putting his case to the Minister or the Minister's representative (First Schedule, para. 4). If the Minister feels the objector should have an opportunity of putting his case to the Minister's representative the Minister can arrange for this, but the hearing will be an entirely private matter in which both the objector and the authority seeking the Designation Order will have an opportunity of putting their respective cases to the Minister's representative (First Schedule, para. 5). The foregoing will be the normal procedure under this Act for dealing with objections and it will be observed that the public local inquiry which has hitherto been customary in matters of this kind does not occur. Indeed, such an inquiry will not be held at all except when the Minister (and this is entirely a matter for the Minister's discretion) is of opinion that the matters to which the objection relate are such as to require a public local inquiry (First Schedule, para. 6).

A Designation Order whether in respect of an area of extensive war damage or in respect of overspill connected therewith merely *declares* the land comprised in the Order as being subject to compulsory purchase. It does not actually authorise the compulsory purchase of the land. Such compulsory purchase will be dealt with by means of a Compulsory Purchase Order made by the local planning authority and confirmed by the Minister (section 2 (1)). Such a Compulsory Purchase Order may be made *at any time* so long as the antecedent Designation Order remains in force, but a Designation Order may be determined by the authority on whose application it was made (section 2 (5)) and an owner of property need not wait for ever for an authority to make a Compulsory Purchase Order which is dependent upon a Designation Order but may bring matters to a head (section 2 (4)) after the expiration of *five years* from the date yet to be appointed by the Minister under section 1 (1) as being the date when the making of applications for Designation Orders has become practicable.

In certain circumstances a local planning authority may obtain a Compulsory Purchase Order in respect of land in an area of extensive war damage notwithstanding the fact that the land has not previously been included in a Designation Order under section 1 (1), but in any such case the Compulsory Purchase Order must be submitted for the Minister's approval before the expiration of *three years* from the date yet to be appointed under section 1 (1) by the Minister (section 2 (2)) and, here again, the owner of property has power to bring the matter of the acquisition of his property to a head in a case where the acquiring authority are dilatory (section 2 (4)).

(2) AREAS OF BAD LAY-OUT AND OBSOLETE DEVELOPMENT.

A local planning authority are authorised to acquire compulsorily any area of land within their boundaries in which there exist conditions of bad lay-out and obsolete development with or without additional land contiguous or adjacent thereto (and whether within or outside

the authority's boundaries) which ought, in the Minister's view, to be laid out afresh and redeveloped as a whole (section 9 (1)).

Areas of bad lay-out and obsolete development if redeveloped in accordance with proper planning principles will produce an overspill both of population and of industry and may also necessitate replacement of open space. Accordingly, a local planning authority may acquire compulsorily any land, whether within or outside their own boundaries, required for the re-location of overspill and for the replacement of open space (section 9 (2)) consequent upon the redevelopment of an area of bad lay-out and obsolete development.

The right of an authority to acquire land under section 9 is of indefinite duration.

(3) LAND FOR SPECIFIC PLANNING PURPOSES.

A local planning authority are authorised (section 10 (1)) to acquire compulsorily any land, whether within or outside their own boundaries, if the Minister is satisfied that it is required:—

- (a) for development of any class needed for the proper planning of the area of the authority in order to secure a proper balance of development;
- (b) for use as a public open space or playing field;
- (c) as an alternative site for development (the furtherance of which is in the public interest) in substitution for land on which it is sought to carry out such development but on which such development cannot be allowed consistently with the proper planning of the area of the authority; or
- (d) for providing accommodation for persons or undertakings who by reason of war circumstances are for the time being living or carrying on business in unsatisfactory accommodation elsewhere and who would be likely *to return* to the area of the authority or *to come* to that area (and whose return or coming would, in the circumstances, be inconsistent with the proper planning of the area) unless accommodation is found for them elsewhere. In this connection "accommodation" means accommodation for residential purposes or for the carrying on of business or other activities, together with all appropriate public services, facilities for public worship, recreation and amenity, and other requirements (section 10 (5)). This provision clearly envisages the establishment by local planning authorities of satellite towns entirely outside, and maybe at some distance from, their own boundaries.

It is specially to be mentioned, however, that an authority are not entitled to acquire land for any of the four purposes above mentioned (except for use as a public open space or a playing field) if the Minister is satisfied (a) that the circumstances are not such as to render it expedient in the public interest that the land should be acquired by a local planning authority, (b) that there is some person other than the authority who is able to meet the requirement for which the land is needed, and (c) that such person is able to get the requisite land on reasonable terms (section 10 (1)).

A local planning authority may acquire compulsorily land which

is either within, or in the neighbourhood of, an area of extensive war damage and which ought, in the opinion of the Minister, to be developed along with any land within the area of extensive war damage which has been made the subject of a Designation Order under section 1 or a Compulsory Purchase Order under section 2 (2) of this Act (section 10 (2) (a)).

A local planning authority may also purchase compulsorily without the making of any prior Designation Order under section 1 any land which the Minister is satisfied will be required for the purpose of re-location of population or industry or for replacement of open space in the course of the redevelopment of an area of extensive war damage or of land in the neighbourhood of an area of extensive war damage (section 10 (2) (b)).

Land which is derelict and which is likely, unless acquired by a local planning authority, to remain derelict for a considerable period, may also be purchased compulsorily by a local planning authority (section 10 (3)). Under this provision it is important to distinguish land which is *derelict* from land which is for the time being *undeveloped*. For example, an authority could, under this provision, acquire the site of mineral workings when all the minerals which are commercially workable have been won and further workings are, accordingly, not likely. On the contrary, an authority would not be entitled under this provision to acquire undeveloped virgin land which for the time being is not being used for any particular purpose but which clearly has a potential building value.

The right of an authority to acquire land under section 10 is of indefinite duration.

(4) LAND FOR MISCELLANEOUS PURPOSES.

Provision is made by the Act for the compulsory purchase by a local highway authority and also by the Minister of War Transport of land required for the purpose of providing highways in connection with the redevelopment of areas of extensive war damage or the development of land which is to be used for the re-location of population or industry or for the replacement of open space (section 3).

Where land has been made the subject of a Designation Order under section 1 (1) or (2) it may be acquired compulsorily for the public service by the Minister of Works and the Minister of Town and Country Planning acting jointly and, where it is required for the purpose of the Post Office, by the Postmaster-General and the Minister of Town and Country Planning acting jointly (section 4).

The right of an authority or a Minister to acquire land under section 3 or 4 is of indefinite duration.

(5) DISPLACEMENTS FROM LAND ACQUIRED.

The acquisition of land under this Act, whether by a local planning or highway authority, will obviously involve the displacement of persons from their homes, and it is, accordingly, the duty of the acquiring authority to see to it that alternative accommodation in advance of any displacements will be available (section 30 (1)). It is worthy of special note that this duty with respect to re-housing applies to *all persons* who are displaced and not merely to persons of the

working classes. The provision thus goes further than the obligation imposed on an acquiring authority by section 137 of the Housing Act, 1936, and, accordingly, the provisions of that section do not apply to acquisitions of land under this Act (section 30 (2)).

A local planning or highway authority may, with the assistance of the Minister, obtain possession of a dwelling-house notwithstanding the fact that it is protected under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, provided possession of the house is *immediately* required for the purposes for which it was acquired or appropriated (section 30 (3)).

A local planning or highway authority who have either acquired or appropriated for the purposes of this Act any building, or a Minister who has acquired any building for the purposes of this Act, may obtain possession of the building under the Small Tenements Recovery Act, 1838, notwithstanding that the value or rent of the building exceeds £20 a year (section 30 (4)).

A local planning or highway authority or a Minister *may* pay to any person displaced by the carrying out of redevelopment under this Act reasonable removal expenses, and to a person carrying on a business in premises from which he is displaced they *may* further pay such reasonable allowance as they think fit towards his losses consequent upon the disturbance caused to his business (section 30 (5)). Neither removal expenses nor allowances towards business losses can be claimed as of right; their payment rests entirely at the discretion of the acquiring authority or the Minister as the case may be.

(6) OBLIGATION TO PURCHASE WAR-DAMAGED LAND.

An interesting provision from the property owner's point of view is that whereby it is enacted that if land (including buildings) has sustained war damage and remains incapable of reasonably beneficial use because of such damage, and if an interim development application for consent to the development of such land is refused or is granted for a limited period only or, where the application seeks permission for a limited period only, is granted for a period shorter than that applied for, then the owner of the land may, in certain circumstances, *require* the land to be purchased by the local planning authority (section 11 (1)). Guidance for the determination of what will probably be a very difficult question, namely, whether land in its war-damaged state is capable of reasonably beneficial use, is given in the Act (section 11 (5) and (8)).

(7) COMPULSORY PURCHASE ORDERS.

In all instances where compulsory acquisition of land by a local planning or highway authority is authorised by this Act the acquisition will be by means of a Compulsory Purchase Order *made* by the authority and *confirmed* by the Minister in accordance with the provisions of Part I of the Second Schedule. If it is a Minister who is authorised to acquire land compulsorily the procedure will again be by means of a Compulsory Purchase Order *made* by the Minister himself in accordance with Part II of the Second Schedule.

When a Compulsory Purchase Order has been made by an acquiring authority under any of the provisions of the Act mentioned above,

notice of the submission of the Order to the Minister for confirmation must be published in the *local press in all cases* and in the "London Gazette" *in certain cases* (Second Schedule, para. 2 (1) and (3)).

It is of especial interest to the property owner to note that if the Compulsory Purchase Order relates only to land in respect of which a Designation Order under section 1 is in operation, notices of the submission of the Compulsory Purchase Order to the Minister need not be *served* upon the individual owners of the land affected by it and even where the Compulsory Purchase Order is not dependent upon a Designation Order such notices need only be served upon individual owners if the Minister so directs (Second Schedule, para. 2 (2)).

Objections to the confirmation of Compulsory Purchase Order can be made to the Minister, but if they are they will be dealt with in a fashion similar to that (already described) applicable to objections made in respect of a Designation Order (Second Schedule, para. 3). Accordingly, it is unlikely, as has been explained earlier in this article, that there will be any public local inquiry as a result of the making of objections to any Compulsory Purchase Order made under this Act.

Not only has the procedure for obtaining a Compulsory Purchase Order been simplified and expedited by this Act but the actual vesting of the land in the acquiring authority may also be expedited by the Minister directing, when confirming the Compulsory Purchase Order, that the provisions of the Sixth Schedule to the Act shall apply to the Order which then becomes known as a "purchase order providing for expedited completion" (section 18 (3)).

The most novel feature of the procedure detailed in the Sixth Schedule is that an acquiring authority are saved the trouble of serving individual notices to treat for land included in their Compulsory Purchase Order, it being provided that on the date when the Compulsory Purchase Order is registered in the appropriate register of local land charges pursuant to section 17 of the Act, the acquiring authority are deemed on that date to have served a notice to treat on every person concerned (Sixth Schedule, para. 1 (1) and (2)).

If the land to be acquired happens to be held by a statutory undertaking for *operational* purposes (but not for other purposes) acquisition will still be by Compulsory Purchase Order but the *special procedure* of section 13 and the Third Schedule will have to be followed.

III. Amendments of Planning Law.

Sections 31 to 46 inclusive contain what are the true planning provisions of this Act and four of those sections, namely, sections 41, 42, 43 and 45 are of special interest to the property owner.

(1) AGRICULTURAL BUILDINGS.

The provisions of sub-section (3) of section 12 of the Town and Country Planning Act, 1932, which has hitherto kept agricultural buildings beyond the pale of planning now cease to have effect, and agricultural buildings now become the subject of planning control as much as any other kind of building (section 41). In so providing this Act implements one of the recommendations of the Scott Report.

During the period of interim development elapsing before a planning scheme comes into operation, a farmer erecting agricultural buildings is now regarded as carrying out interim development and must obtain the consent of the appropriate interim development authority under section 10 of the Town and Country Planning Act, 1932, or, if he persists in his development without such consent, run the risk of having his buildings removed under section 5 of the Town and Country Planning (Interim Development) Act, 1943, without payment of compensation. It is, of course, open to the Minister to provide in any further General Interim Development Order made by him under section 10 (1) of the Town and Country Planning Act, 1932, in substitution of the Town and Country Planning (General Interim Development) Order, 1933, that certain specified types of agricultural buildings scheduled in the Order may be erected as of right and without application for consent thereto being made to an interim development authority. From remarks made by the Parliamentary Secretary to the Ministry of Town and Country Planning when section 41 was debated in the House of Commons, it would appear that the Minister has in mind the making of some General Interim Development Order on these lines.

(2) BUILDINGS OF SPECIAL ARCHITECTURAL OR HISTORIC INTEREST.

The owner of a building of special architectural or historic interest will find himself affected by sections 42 and 43 of this Act. It is now open to the Minister to compile lists of such buildings or to approve such lists compiled by other persons (section 42 (1)). Before taking any such action the Minister must consult with such persons or bodies as appear to him appropriate as having special knowledge of buildings of this kind (section 42 (4)). Such person or bodies would include, for example, the Council for the Preservation of Rural England, the National Trust, and the Town Planning Institute, but would not necessarily include the owner of a building which it is proposed to list. Indeed, *before* such a building is listed nothing need be said to the owner at all, but he must be informed "as soon as may be" after the listing of his building has taken place (section 42 (3)).

An owner has no appeal against the listing of a building and once listed the owner may neither demolish the building, nor alter or extend it so as seriously to affect its character, without first giving at least two months' notice of his proposals to the local planning authority (section 43 (5)). Urgent repairs only may be carried out without prior notice. If an owner demolishes, alters or extends as mentioned above a listed building without giving due notice to the local planning authority, he is liable to a fine not exceeding £50, and may be ordered to pay the cost of restoring the building to its former state (section 43 (7)).

Since the coming into force of section 17 of the Town and Country Planning Act, 1932, it has been possible for a local authority to make Orders under that section preventing the *demolition* of a building of special architectural or historic interest. This power is now extended so as to make an Order under that section capable of preventing not merely the demolition of a building, but also any *alteration or exten-*

sion which would seriously affect its character (section 43 (1) (2) and (3)). Any owner of a building infringing the provisions of any such Order is now liable to a penalty of £50 and may be ordered to pay the cost of restoring the building to its former state (section 43 (7)).

A new power is conferred upon local authorities authorising them to acquire *by agreement* with the owner and with the consent of the Minister any building of special architectural or historic interest (section 43 (9) (a)). Moreover, if an Order under section 17 of the Town and Country Planning Act, 1932, is in force in respect of a building and the building is not being properly maintained, a local authority may acquire the building *compulsorily* by means of a Compulsory Purchase Order made by them and confirmed by the Minister (section 43 (9) (b)). In view of this the tenant for life under a settlement will be interested to know that he is entitled to expend capital money without first getting the consent of the trustees of the settlement or of the Court in carrying out works of maintenance specified by the Minister as being required for the maintenance of a building in respect of which an Order under section 17 of the Town and Country Planning Act, 1932, is in force (section 43 (11)).

(3) EXTENSION OF PROTECTION FOR EXISTING BUILDINGS AND USES.

Provision may be made in a planning scheme in accordance with section 19 (2) (ii) (c) of the Town and Country Planning Act, 1932, for the replacement of certain buildings which have been destroyed or demolished, by new buildings provided the new buildings are commenced within two years after the destruction or demolition of the previous buildings or within such longer period as the responsible authority under the planning scheme may permit. Where the destruction or demolition of the previous building has occurred during "the war period" (and many buildings entitled to this protection have been destroyed by enemy action during "the war period") for the aforementioned period of two years, there is to be substituted a period ending two years after the expiration of "the war period" or after the coming into operation of the planning scheme whichever is the later (section 45 (1)).

In this connection "the war period" means (section 45 (4) (a)) the period beginning September 3, 1939, and ending with the expiration of the Emergency Powers (Defence) Act, 1939.

By virtue of the definition of "existing use" in section 53 of the Town and Country Planning Act, 1932, if the existing use of a building is discontinued for eighteen months, no use of the building at any subsequent date will be deemed an existing use and the benefits with respect to compensation attaching to existing uses will, accordingly, be lost.

It is now provided (section 45 (3)) that if during "the war period" (as defined above) the existing use of a building has been discontinued:—

- (a) because of war damage; or
- (b) because of the requisitioning of the building under war-time emergency powers; or
- (c) because of arrangements for the concentration of production approved by the Board of Trade; or

- (d) because of the absence of the occupier in the armed forces of the Crown, or in the merchant navy, or the mercantile marine, or in a civil defence force within the meaning of the National Service Acts, 1939 to 1942, or, in the case of a woman, in any of the capacities mentioned in the First Schedule to the Reinstatement in Civil Employment Act, 1944; or
- (e) because of any other circumstances prescribed by Regulations made from time to time by the Minister; or
- (f) because of the refusal, by the Minister on appeal, of an interim development application for permission to resume the use; no regard shall be taken of any period during which the use of the building was discontinued on any of the grounds above mentioned when calculating the aforementioned period of eighteen months.

In the previous paragraph the reference to the refusal by the Minister *on appeal* of an interim development application must be construed (section 45 (4)) as including also a reference to the refusal by him of an interim development application referred to him for determination *in the first place* (and not by way of appeal) under section 6 (1) of the Town and Country Planning (Interim Development) Act, 1943.

IV. Compensation.

Part II of this Act provides a new code for the assessment of compensation in connection with the compulsory acquisition of land for public purposes. The new code applies *whether the acquisition is pursuant to this Act or not*, but its operation is limited to the period of five years from the date of the commencement of this Act on November 17, 1944.

(1) "BASIC" COMPENSATION.

Hitherto the principle has been that compensation in connection with the compulsory acquisition of land should be assessed by reference to prices current at the date of the service of the notice to treat for the acquisition of the land. Owing to the exigencies of war there has been a great unsettling of land values which have dropped severely in some areas and have risen greatly in others. The Legislature has taken the view that for the present there is no stable market by reference to which compensation can be assessed, and this Act, accordingly, provides that compensation in respect of the compulsory acquisition of land for public purposes, provided the notice to treat therefor is served (or is deemed to have been served, by virtue of sections 18 (3), 65 (3) and the Sixth Schedule to the Act) before November 17, 1949, shall be assessed by reference to prices current on March 31, 1939 (section 57 (1)). This principle, however, is not to apply in the case of compensation assessed on a reinstatement basis (as specified in Rule 5 of the Rules set out in section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919) (section 57 (1)) and furthermore is subject to the provisions of the Seventh Schedule to the Act in so far as it is applied to (a) tenancies, (b) land capable of being redeveloped in combination with other land, (c) dwelling-houses to which the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1925, apply, and (d) agricultural holdings

(section 57 (2)). Compensation for disturbance is not in any case to be higher than it would be irrespective of this new principle (section 57 (3)).

It is to be observed that the Act makes 1939 prices not a *ceiling* for the assessment of compensation but a *standard* and, accordingly, if property has been sold since 1939 at a price higher than the 1939 price, an authority subsequently acquiring the land for public purposes will obtain the land at less than the price for which it was previously sold. Conversely, if since 1939 the property has been sold at a price less than the 1939 price, an authority subsequently acquiring the land for public purposes will have to pay a higher figure than that for which the land was previously sold.

There has been a deal of anxious thought as to what is to happen in a case where since 1939 land has been valued for estate duty purposes at a figure which is higher than the value of the land when assessed, on subsequent compulsory purchase for public purposes, by reference to 1939 prices, and on this important point it is worth quoting the remarks of the Chancellor of the Exchequer, Sir John Anderson M.P., when the matter was debated in Parliament. The Chancellor of the Exchequer is reported as saying (House of Commons, Official Report, October 25, 1944, V. 404, c. 294): "I recognise the anomaly of an assessment, at more than 1939 values, of an interest which has passed on death, and which is subsequently acquired by a local authority at a lower basis of compensation than that on which estate duty has been levied. But I do not think the amendment is one that it would be proper to accept, because acceptance would mean that the local or other public authority which had to pay compensation would be bound by something quite irrelevant, by something which had been done by some other authority operating under a different code of law. So I cannot accept the amendment, but what I can and will do is this: I will give an assurance on behalf of the Government that when such a case does arise, if, after estate duty has been assessed, there is subsequent acquisition, and the price at which the property or interest is assessed is less than the value taken for the purpose of estate duty, then I will provide for the reopening of that assessment, so as to get rid of any inconsistency between the value on which the taxing authority has proceeded and the value under this Bill for the purposes of acquisition.

"I have only two points that I must safeguard in that connection. The first is that I think it will be essential so to frame the appropriate arrangement, which will have to be embodied in the next Finance Bill, as to apply only in cases where there is continuity of ownership. If the interest has been played about with, so to speak, in the interval between the two transactions, so that it cannot be identified, then the relief I am proposing may not be possible. The other point that must be safeguarded is that the interest which has to be dealt with must be substantially the same in the two cases. For instance, a reversionary interest at the date of death is one thing, and two or three years later it is something different".

(2) SUPPLEMENTARY COMPENSATION FOR OWNER-OCCUPIERS.

Over and above any "basic" compensation to which a person may be entitled under section 57 of the Act, supplementary compensation

may be payable to an owner-occupier of either a building or of agricultural property, *i.e.*, "agricultural land" or "agricultural buildings" (as defined in section 2 of the Rating and Valuation (Apportionment) Act, 1928) or a farmhouse (as defined in section 58 (7) of this Act).

Supplementary compensation to an owner-occupier is dependent on the payment of "basic" compensation under section 57, and accordingly the right to such supplementary compensation can only be claimed during the period of five years from the commencement of the Act. Even where the right is claimed it does not necessarily follow that supplementary compensation will become payable for the supplement is limited to such sum, *if any*, as may be reasonable having regard to all the circumstances of each individual case (section 58 (1)). Where the supplement does become payable it may not in any circumstances exceed 30 per cent. of the value of the building or property in question when ascertained by reference to prices current in 1939 (section 58 (2) and (3)). This figure of 30 per cent. is, however, liable to alteration to a *higher* or to a *lower percentage* by means of an Order made by the Treasury and approved by each House of Parliament (section 60 (3)).

In making provision for supplementary compensation to owner-occupiers the Legislature is clearly drawing a distinction between the interest of an owner *as occupier* of property and the interest of an owner *as investor* in property and is seeking to compensate him as occupier but not as investor. Accordingly, the Act goes into great detail in defining what persons are to be regarded as owner-occupiers (section 58 (5) and (6)). These provisions, which are especially important from the point of view of the property owner, are summarised in the following paragraphs.

An owner will be deemed to be an owner-occupier of property (*i.e.*, a building or agricultural property)—

- (1) if he is in occupation of the property at the time of the service of the notice to treat; or
- (2) if he was in occupation of the property up to the time when it was so damaged as to be unfit for occupation; or
- (3) if he was in occupation of the property when it was requisitioned under war-time emergency powers; or
- (4) if (i) at the date of the service of the notice to treat his title to the property is such that he is
 - either (a) already possessed of the right to enter into occupation of the property;
 - or (b) will become possessed of that right within five years of the date of the service of the notice to treat, *and*

if (ii) it was his intention at the date of the service of the notice to treat

- either (a) to enter into occupation of the property (assuming it was possible for him to do so) within the said period of five years; or
- or (b) to have the property, if so damaged as to be unfit for occupation, restored for his occupation (assum-

ing it was possible for him to occupy it) within the said period of five years;

- or (c) to enter into occupation (assuming it was possible for him to do so) within the said period of five years of other premises to be substituted for the property by reason of the latter being so damaged as not to be fit for occupation.

As an example of the kind of case which is very likely to occur and which is covered by item (4) above, there may be quoted the case of the property owner who is a soldier on military service abroad at the time of the notice to treat for the acquisition of his property. If the soldier is possessed at the date of the notice to treat of both the *right* to enter forthwith into occupation of the property and the *intention* to enter into occupation of the property within five years of the notice to treat, he may be regarded as an owner-occupier, even though, notwithstanding his intention, he is unable actually to enter into occupation of the property because he is serving abroad. Similarly, if the soldier, whilst possessed at the time of the notice to treat of the intention to enter into occupation of the property within five years, has not *then* got the right to enter into occupation but, under his title to the property, *will* get such right within five years of the notice to treat, he may again be regarded as an owner-occupier notwithstanding the fact that he is unable actually to enter into occupation of the property by reason of the fact that he is serving abroad. Such is the effect of the important words in paragraph (d) of section 58 (5), "subject to its being possible for him so to do". In other words, provided the soldier is otherwise entitled to be regarded as an owner-occupier of property he is not to be excluded from that category (and consequently from the right to receive supplementary compensation) by reason of the fact that his military service makes it impossible for him to enter into occupation of the property (or of substituted premises in a case where the property is so damaged as not to be fit for occupation) within five years of the notice to treat for the acquisition of the property.

Further guidance as to the interpretation of the expression "owner-occupier" is contained in section 58 (6) under paragraph (b) of which occupation of part of a building may render a person the owner-occupier of the entire building. This, however, is not to be the case where the owner of, say, a block of offices or flats occupies a single office or flat in the block as an office for the purpose of the management of the rest of the block. To be excluded from the category of owner-occupier on this ground it is essential that the occupation of any such single office or flat should be for the purpose *wholly or mainly of the management of the rest of the block*. It follows from this that a large store owning (as they often do) a five-storeyed building, occupying the ground floor for the purposes of their store and letting off the remaining four storeys to tenants, will be owner-occupiers of the entire building by reason of the fact that their occupation of part of the building (the ground floor) is not wholly or mainly for the purpose of the management of the rest of the building but, on the contrary, is for the purposes of their store. Similarly, to take a more humble example, the owner of a two-storeyed dwelling-

house who lives on the first floor and lets off the ground floor to a tenant for the purposes of a small shop, will be, by virtue of his occupation of the first floor of the house, an owner-occupier of the entire house because he does not occupy the first floor wholly or mainly in connection with the management of the dwelling-house as a whole but, on the contrary, for the purposes of a residence.

Under paragraph (c) of section 58 (6) an owner may be treated as an owner-occupier of property even though the property is not actually in his occupation, provided it is in the occupation for the purposes of his employment of someone employed by the owner. Thus, a farmer will be the owner-occupier of cottages owned by him and occupied in the course of their employment by farm labourers employed by him, but he will not be the owner-occupier of a cottage owned by him and let to a tenant who is not in his employ at all.

In connection with paragraph (c) it may be mentioned that in the case of companies which operate multiple stores, co-operative stores, banks, etc., and which usually have "branches in all parts", the occupation of the various branches rests in the company operating the entire concern and not in the respective managers for the time being of the different branches.

In connection with the reference in paragraph (c) to caretakers, it is important to ascertain the reason why a caretaker has been installed. The position appears to be that if an owner installs a caretaker in premises for the purpose of letting the premises, the owner is not to be treated as an owner-occupier of the premises, but if the caretaker has been installed purely for the purpose of looking after the premises on behalf of the owner, it is the owner himself and not the caretaker who is in occupation of the premises. As an example there may be mentioned the seaside bungalow in which an owner lives during the summer but which he leaves empty in the winter save for the caretaker who is left to take charge of the premises until the owner resumes residence during the following summer. In such a case the owner must be regarded as being in occupation of the premises the whole year round whether he is actually living in the bungalow or not, and he will, accordingly, be an owner-occupier of the premises.

By paragraph (d) of section 58 (6) a landlord is not prevented from being treated as an owner-occupier of premises by reason only of the fact that—

- (1) he cannot for the time being enter into occupation of the premises because there is subsisting a tenancy of the premises for a term which, whether by virtue of section 1 (1) of the Validation of War-time Leases Act, 1944 (which makes certain war-time tenancies take effect as if granted for a term of ten years) or otherwise, has more than five years to run at the time of the notice to treat but which is nevertheless subject to a right on the part of the landlord to determine the tenancy at the end of the present war if it ends before the expiration of the term of the tenancy; or
- (2) he cannot for the time being get possession of a dwelling-house because the tenant is a protected tenant under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939; or

- (3) he cannot for the time being get possession of the premises because they have been requisitioned under war-time emergency legislation.

The object of paragraph (e) of section 58 (6) is to exclude from the category of owner-occupier any person who enters into occupation of premises with the sole object of getting himself within that category. Whether a person is or is not a *bona fide* owner-occupier of premises will be a question of fact to be settled according to all the circumstances of each individual case.

Provision is made for the settlement by a county court of any question as to whether a person is an owner-occupier for the purposes of section 58 of this Act (section 60 (1)).

(3) SUPPLEMENTARY COMPENSATION FOR IMPROVEMENTS.

In addition to "basic" compensation payable under section 57 there may be payable supplementary compensation in respect of improvements to buildings or agricultural land executed since March 31, 1939, and before the service of a notice to treat (section 59). As supplementary compensation for improvements is dependent upon there being payable in the first place "basic" compensation under section 57 it follows that such supplementary compensation can only be claimed during the period of five years from the commencement of the Act on November 17, 1944.

Supplementary compensation for improvements is not necessarily payable in all cases for it is provided that it shall be such sum, *if any*, as may be reasonable having regard to all the circumstances (section 59) and whilst there is no limit on the amount payable (provided, of course, any is payable at all), regard is to be had, in assessing the amount payable, to—

- (1) the cost of the improvements themselves;
- (2) any subsidy paid out of public funds towards such cost; and
- (3) the fact that increased returns may have been received in respect of the improvements and may themselves be regarded as a set-off against the capital expenditure involved in the carrying out of the improvements.

A person may claim supplementary compensation both as an owner-occupier and also in respect of improvements, but he will be entitled to receive only whichever of those two amounts of compensation is the greater (section 60 (4)).

(4) COMPENSATION FOR WAR-DAMAGED LAND.

Where under section 57 of this Act compensation is to be assessed by reference to 1939 prices and the property which is being acquired for public purposes happens to be a hereditament which has sustained war damage and the value of which, under the War Damage Act, 1943, is to be ascertained by reference to its state after war damage, provision is made (section 61 (1) and the Eighth Schedule) that there shall be no separate assessment of compensation in respect of the acquisition of the hereditament under this Act but that the amount of any "basic" compensation payable under section 57 of this Act shall be the amount certified by the War Damage Commission as the

value of the hereditament for the purpose of ascertaining the amount of a "value payment" under section 10 of the War Damage Act, 1943.

The object of this provision is to avoid two separate valuations of the same hereditament *both* related to 1939 prices. The provision is without prejudice to any right which an owner may have to supplementary compensation under section 58 as an owner-occupier or under section 59 in respect of improvements (section 61 (2)).

CHARITIES AND CONVEYANCING.

By E. O. WALFORD, LL.D.

Possibly charity law is the most difficult and least charted sea upon which the conveyancer has to sail. It is certainly full of reefs and sandbanks. The feature which has struck the present writer most forcibly is the fact that no existing work appears to deal at all conclusively and methodically with the three chief questions which concern conveyancers when considering whether a disposition by or in favour of a charity is in order, namely, (a) the conditions attaching to conveyances of land to charities (whether incorporated or not); (b) the question of approval by the Charity Commission; and (c) the question whether the document requires enrolment or recording with the Charity Commission or Board of Education.

It was realised from the commencement of the preparation of this article that in order to make the article of real practical value to busy practitioners it would be necessary to indulge in a certain amount of repetition. The reason for the repetition being thus explained, I make no further apology for it. Cross references have been inserted where they appeared to be sufficient.

I need hardly say that it is impossible within the compass of an article, or even of a series of articles, to deal exhaustively with the subject; and in particular it has been necessary to exclude any *special* reference to ecclesiastical charities. It is hoped, however, that most of the points affecting charities generally and which arise with frequency, are dealt with in the ensuing pages.

As I have already indicated, there are three main questions which require consideration in connection with the acquisition and disposal by charities of interests in land:—

- (1) Is there any infringement of the law of mortmain or of statutory requirements as to the form of the deed of donation or of disposition or other formalities or conditions in connection therewith?
- (2) Is the approval of the Charity Commission or Board of Education necessary?
- (3) Should the deed effecting the acquisition or disposition be recorded with the Charity Commission, or the Board of Education in the case of an educational charity?

It is proposed to deal with those questions under separate headings, constituting Parts I, II and III of this article. Part IV contains

notes concerning the Official Trustee of Charity Lands and the Official Trustees of Charitable Funds. Part V will contain a short note on Educational Trusts. In Part VI it is proposed to deal separately with registered land.

PART I.

MORTMAIN AND OTHER RESTRICTIONS.

1. Mortmain and Charitable Uses Act, 1888.

In the words of Blackstone, "alienation in mortmain, *in mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastic or temporal": Vol. II, p. 268. Blackstone writes with obvious satisfaction of the strengthening by Edward I of the statutes of mortmain thus (as he suggests), "closing the great gulph in which all the lands of the Kingdom were in danger of being swallowed" (Vol. II, p. 110), and records further developments in that direction. The general rule was that alienation in mortmain was permitted only by licence from the Crown. However, even in Blackstone's time some modification of the law had been made in favour of hospitals and other charities. The position at the present day is governed to a considerable extent by the Mortmain and Charitable Uses Act, 1888, as modified by subsequent legislation.

By section 1 of that Act the effect of an unauthorised assurance of land to or for the benefit of any corporation in mortmain is to forfeit the freehold to the Crown, unless such alienation is authorised by statute or by a licence from the Crown. Where land is held of mesne lords certain special provisions are made for protecting the rights of the mesne lords; but these are not of general importance at the present day. "Land" for this purpose includes tenements and hereditaments corporeal or incorporeal of any tenure: *Mortmain and Charitable Uses Act, 1891, s. 3*; but as to leases see *Truro Corporation v. Rowe*, [1902] 2 K. B. 709.

2. Exceptions from Act of 1888.

The following are the main exceptions from the general rule prohibiting conveyances of land to corporations:—

(1) *Companies Incorporated Under the Companies Acts and Other Statutory Bodies.*

Subject to the qualification next mentioned companies incorporated under the Companies Act, 1929, can hold land without limitation as to quantity, Companies Act, 1929, s. 14 (1). It is, however, provided by the same section that companies "formed for the purpose of promoting art, science, religion, charity or any other like object *not involving the acquisition of gain by the company or by its individual members*, shall not, without the licence of the Board of Trade, hold more than two acres of land". These provisions are applicable whether the company was incorporated under the former Joint Stock Companies Acts or the Companies Act, 1862, or the Companies (Consolidation) Act, 1908: see Companies Act, 1929, s. 316, or so it would seem. (Presumably there is no distinction for this purpose between the expression "incor-

porated" in section 14 (1) (*supra*) and "formed and registered" in section 316.)

As to other statutes enabling various special bodies such as ecclesiastical corporations, public utility companies and local authorities to hold land either without limit or subject to certain limitations, see Halsbury's *Statutes*, Vol. 2, p. 386, and the statutes there mentioned and Part III, section B below.

There are, however, certain assurances to which the Act of 1888 does not apply at all. They are expressly exempted from both sections 1-3 (Mortmain restrictions) comprising Part I of the Act, and also from sections 4 and 5 which comprise Part II of the Act and deal with the conditions governing assurances to charitable uses: see sub-paragraph (2) next following.

(2) *Express Exemptions from the whole of the 1888 Act.*

The following assurances are exempt from both the Mortmain provisions forbidding alienation and those concerning the form of assurances as set out in paragraph 3 below; but observe that such assurances require enrolment and that the provisions of paragraph 3 A (3) below as to extension of time for enrolment do not appear to apply to the cases set out in clauses (a) and (b) below (see Part III of this article, *post*, as to enrolment).

(a) Assurances by *deed* of land of any quantity for the purpose of a public park or a museum [or a schoolhouse for an elementary school] (a). But if the deed is not made in good faith "for full and valuable consideration" then (i) it must be executed at least one year before the grantor died, and (ii) it must be *enrolled* with the Charity Commission (or the Board of Education in the case of educational charities) *within six months after the execution of the deed*: Mortmain and Charitable Uses Act, 1888, s. 6 (1).

It will be noted that the requirements (i) and (ii) above do not apply if the assurance is made in good faith and "for full and valuable consideration" which for all the purposes of the last mentioned Act "includes such a consideration either actually paid upon or before the making of the assurance, or reserved or made payable to the vendor or any other person by way of rent, rentcharge, or other annual payment in perpetuity, or for any term of years or other period, with or without a right of re-entry for non-payment thereof, or partly paid and partly reserved as aforesaid" (*e.g.*, by reservation of a premium and rent or rentcharge). The consideration must, of course, be "full and valuable" so that if, for example, only a rentcharge is reserved, it must be of such an amount as would be paid by a person dealing at arm's length with the grantees. There does not appear to be anything in the Act which exempts a purchaser from satisfying himself that the consideration *was* full and valuable. In practice, however, if the assurance had been executed many years ago and the consideration was not obviously deficient, a requisition on this point would not usually be pressed.

(b) Assurances *by will* of (i) not more than twenty acres of land for a public park, two acres for a public museum [or one acre for a schoolhouse for an elementary school] (b), or (ii) personal estate to

(a) See "Educational Trusts" below.

(b) *Ibid.*

be laid out in the purchase of land "for all or any of the same purposes only": Mortmain and Charitable Uses Act, 1888, s. 6 (1).

As to paragraph (b) (ii) it would seem that there is no limit to the amount or value of the "personal estate" which can be left for the purpose of a public park, museum, or schoolhouse, the provisions limiting acreage relating only to assurances by will of *land*. Note that the will containing the assurance whether of land or personalty must be (a) executed not less than one year before the grantor dies, or be a reproduction in substance of a devise made in a previous will (including, I think, a codicil) in force at the time of such reproduction (such previous will having been executed not less than one year before the testator's death); (b) enrolled in the books of the Charity Commission within six months after the death of the testator: Mortmain and Charitable Uses Act, 1888, s. 6 (2). It is necessary to observe that the provisions of section 5 of the 1888 Act and of section 29 of the Settled Land Act, 1925, enabling deeds to be recorded out of time do not appear to apply to the exempted cases above mentioned (see Part III below). But as to gifts by testators generally see paragraph 3 B *post*, "*Assurance to Charities by Will*". For the sake of clarity it may be mentioned that if the gift fell within section 6, *supra*, it did not matter whether the gift was to a charity which was a corporation or to trustees for an unincorporated charity. In neither case was there any infringement of the Mortmain law, nor did the "Requirements" set out in paragraph 3 below apply.

(3) *Assurances to Incorporated Trustees.*

Under the Charitable Trustees Incorporation Act, 1872, trustees for Religious, Educational, Literary, Scientific and Public Charities may by order of the Charity Commissioners be incorporated, and have a common seal. They will then be able to hold and acquire any property notwithstanding the Statutes of Mortmain and to convey, assign and demise it under their common seal in such and the like manner as the trustees could have done before incorporation. In other words the main effect is that the incorporation does not bring the charity within the Mortmain prohibitions set out in paragraph 1 above, but it does not confer exemption from compliance with the "Requirements" set out in paragraph 2 (1) above and in paragraph 3 below. This Act does not seem to have been utilised very widely, and it is believed that the Charity Commissioners will not normally make such an order.

3. Requirements Affecting Charities Whether Incorporated or not.

A. ASSURANCES INTER VIVOS.

The prohibition in connection with assurances to charitable uses is not, however, limited to assurances to corporations. Subject to the exemptions from the whole of the 1888 Act as above set out and the exemptions set out in sub-paragraph (5) below, every assurance of land to or for the benefit of any charitable uses and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses must be made in accordance with the following requirements, and unless so made is void: Mortmain and Charitable Uses Act, 1888, s. 4 (1).

(1) *Must take effect in possession.*

It must "take effect in possession for the charitable uses to or for the benefit of which it is made immediately from the making thereof" (section 4 (2)). But if the grantee is entitled to possession it is not essential to show that he has in fact entered into possession: *Fisher v. Brierley* (1863), 10 H. L. C. 159.

(2) *No power of revocation, etc."*

The assurance must be without any power of revocation, reservation, condition, or provision for the benefit of the grantor or any person claiming under him (section 4 (3)) except the following grants, reservations, etc., in favour of the grantor *and of the persons claiming under him*, namely:—

- (i) The grant or reservation of a peppercorn or other nominal rent (section 4 (1) (i)). (But see clause (vi) below as to assurances for valuable consideration.)
- (ii) The grant or reservation of mines or minerals or of an easement (section 4 (1) (ii) and (iii)).
- (iii) Covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or insurances, and covenants or provisions of the like nature for the use and enjoyment as well of the land comprised in the assurance as of any other adjacent or neighbouring land (section 4 (4) (iv)).
- (iv) A right of entry on non-payment of any such rent or on breach of any such covenant or provision (section 4 (4) (v)).
- (v) Any stipulations of the like nature for the benefit of the assursor or of any person claiming under him (section 4 (4) (vi)).
- (vi) If the assurance is in good faith on a sale for full and valuable consideration, that consideration may consist wholly or partly of a rent, rentcharge, or other annual payment reserved or made payable to the vendor or any other person, with or without a right of re-entry for non-payment thereof (*ibid.*, section 4 (5)). "Full and valuable" consideration for this purpose includes such a consideration either actually paid upon or before the making of the assurance, or reserved or made payable to the vendor or any other person by way of rent, rentcharge or other annual payment in perpetuity, or for any term of years or other period, with or without a right of re-entry for non-payment thereof, or partly paid or partly reserved as aforesaid (*ibid.*, section 10 (iv)).
- (vii) The other requirements depend upon the nature of the property comprised in the assurance: see sub-paragraphs (3) and (4) below.

(3) *Requirements as to assurances of land or personal estate other than stock in the public funds.*

(a) In the case of such assurances executed before January 1, 1926—

- (i) They must have been by deed executed in the presence of two

witnesses, except in the case of assurances of land of copyhold or customary tenure (*ibid.*, section 4 (6)).

- (ii) They must have been enrolled in the Central Office of the Supreme Court within six months after the execution thereof, or if the charitable uses were declared by a separate deed that deed must have been enrolled within six months after the making of the assurance (*ibid.*, section 4 (9)), subject to the provisions of section 5 of the same Act which enables the Court or the Enrolment Department of the Central Office to enrol deeds out of time in the following cases :

The omission to enrol within the period of six months must have been due to ignorance or inadvertence, or the destruction or loss of the instrument by time or accident.

The assurance must have been made "in good faith for full and valuable consideration", and "to take effect in possession immediately from the making thereof without any power of revocation, reservation, condition or provision" except as authorised by the Act (as set out in sub-paragraph (2) above).

Upon enrolment, if at the time of the application for enrolment out of time possession or enjoyment was held under the assurance in question, the enrolment will take effect as if made within the requisite time (*ibid.*, section 5 (2)), subject as follows. The enrolment does not affect the rights of third parties in connection with any proceedings pending at the time of the application, nor does it disturb any decree or judgment made before such application and founded on the invalidity of the assurance in question (*ibid.*, section 5 (3)).

- (iii) Unless the assurance was made in good faith for full and valuable consideration, it must have been made at least twelve months before the death of the assurator (including the days of the making of the assurance and of the death) (*ibid.*, section 4 (7)).

- (b) In the case of such assurances executed *after December 31, 1925.*

The requirements as stated in clause (iii) above apply. Those mentioned in clauses (i) and (ii) do not; but the assurance or the deed declaring the charitable uses must be recorded in accordance with section 29 (4) of the S. L. A., 1925 (see Part III, *post*, below).

(4) *Assurances of stock in the public funds.*

Assurances of stock in the public funds to be laid out in the purchase of land for the benefit of a charity unless made in good faith for full and valuable consideration must be made by transfer thereof in the stock transfer books at least six months before the death of the assurator (including the days of the transfer and of the death) (*ibid.*, section 4 (8)). "Public funds" generally means Government funds, such as Consols, Annuities, or other English public funds : see *Slingsby v. Grainger*, 7 H. L. C. 280; *Howard v. Kay*, 27 L. J. Ch. 448. Such assurances fall within section 29 (4) of the Settled Land Act, 1925,

and if executed after December 31, 1925, they must be recorded pursuant to that sub-section. Observe that there was never any obligation to enrol or as to witnessing by two persons, but the "*Requirements as to Form, etc.*" set out in sub-paragraphs (1) and (2) above applied before 1926 and still apply to such gifts.

(5) *Exemptions.*

The requirements as to form contained in section 4 of the Mortmain and Charitable Uses Act, 1888, set out in paragraph 3 A (1) and (2) above, do not apply to—

- (a) Assurances of land or personal estate to be laid out in the purchase of land to or in trust for certain universities, colleges and houses of learning connected therewith as specified in section 7 (i) of the Mortmain and Charitable Uses Act, 1888, that section having been extended to various other universities by later statutes: see Halsbury's *Statutes*, Vol. 2, p. 391.
- (b) Assurances otherwise than by will made *in good faith and for full and valuable consideration* to trustees on behalf of any society or body of persons associated together for religious purposes or for the promotion of education, art, literature, science, or other like purposes of land *not exceeding two acres* for the erection thereon of a building for such purposes or any of them, or whereon a building used or intended to be used for such purposes, or any of them, has been erected: Mortmain and Charitable Uses Act, 1888, s. 7 (ii).

(6) *Practice Notes.*

(a) What is a building?

There is no reliable answer to the question "What is a building for religious purposes?" It will be observed that in this connection there is no provision as in section 62 of the Charitable Trusts Act, 1853 (which grants certain exemptions from the jurisdiction of the Charity Commissioners) that the building must be *registered and used* as a place of meeting for religious worship (see "Exemptions concerning jurisdiction of Charity Commission" below, Part II, paragraph 2). In a sense, a house held upon trust to be used at all times as the residence of a minister is a building intended to be used for religious purposes. It would not, however, be used solely for religious purposes, but partly for his accommodation during leisure hours whilst not engaged upon the matters falling within the term "religious purposes" and, in many cases, for the accommodation of his wife and family. Accordingly, it is thought that such a house would not fall within the exemption above mentioned.

(b) Registered Land.

The provisions of the Mortmain and Charitable Uses Act, 1888, concerning execution in the presence of witnesses and as to enrolment do not apply to registered dispositions of land registered at the Land Registry: but *separate deeds* declaring trusts of registered land are not regarded by the Charity Commission exempt from those provisions (see "Registered Land", Part V, *post*).

(c) Assurances by Will.

The above provisions relate only to assurances *inter vivos*. As to gifts by will see section B below, "ASSURANCES TO CHARITIES BY WILL".

(d) Exemptions.

Note that the "Express Exemptions from the whole of the 1888 Act" above set out confer exemption from the whole of the "Requirements as to Form" set out above, as well as exemption from the prohibition against alienation in Mortmain.

B. ASSURANCES TO CHARITIES BY WILL.

(1) *Gifts by Testators dying before August 5, 1891.*

See the provisions (set out above) of the Mortmain and Charitable Uses Act, 1888, and the exemptions there mentioned. It is not intended here to deal with the pre-1891 position; but see the remarks at the commencement of sub-paragraph (2) next following.

(2) *Gifts by Testators dying on or after August 5, 1891.*

In the case of testators dying on or after August 5, 1891, the Mortmain and Charitable Uses Act, 1891, applies. The practical effect of that Act is to repeal section 4 of the Mortmain and Charitable Uses Act, 1888, so far as it relates to wills: *Re Hume*, [1895] 1 Ch. 422. It will have been observed that apart from the specific case mentioned by way of exemption the Act of 1888, by laying down the rule above noted that possession must be taken immediately under the assurance, had the effect of prohibiting gifts of land by will, other than gifts exempted from the operation of that Act as above mentioned.

The Act of 1891, however, permitted gifts to charities by will of land or of money to be laid out in the purchase of land without restriction as to quantity, but attached various conditions to such gifts as mentioned in the following summary:

(a) Land may be given by will to any charity, but except as stated below the land must be sold, notwithstanding any direction in the will to the contrary, within one year from the testator's death or such extended period as may be determined by the High Court, or by the Charity Commissioners (*ibid.*, section 5). "Land" for this purpose included "tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land (*ibid.*, section 3). Where land is given by will to trustees upon trust to sell it and to pay the proceeds of sale to a charity the gift is one of personal estate arising from land and section 5 (above) and section 6 below do not apply, but the trustees are not entitled to delay the sale indefinitely: *Re Sidebottom*, [1902] 2 Ch. 389; *Re Wilkinson*, [1902] 1 Ch. 841. In the case of *Re Ryland*, [1903] 1 Ch. 467, the real and personal estate of a testator was given by his will upon trust for conversion, his real estate not to be sold during his widow's lifetime without her written consent. The rents were payable as to part to the widow and as to the residue to a charity; and after her death the whole of the testator's residuary estate was given to the charity. Whilst the reversionary interest in the proceeds of sale

of the real estate was held not to be land within the meaning of section 3 (above), the share of the charity in the rents during the widow's lifetime *was* held to be land within that section, and therefore liable to be sold in accordance with section 5 of the Act of 1891.

(b) After a year from the death of the testator if the land is unsold, and the period for sale of the land has not been extended as above mentioned, it will vest in the Official Trustee of Charity Lands and the Charity Commissioners are required to take all necessary steps for the sale or completion of the sale of the land by the administering trustees of the charity. For that purpose they may make an order directing the sale or its completion, and may by order remove the trustees and appoint others, and provide for the payment of the proceeds of sale to the Official Trustees of Charitable Funds in trust for the charity (*ibid.*, section 6). It has been held that even when vesting in the Official Trustee of Charity Lands has already taken place under the last-mentioned provision (section 6), the Court still has power under section 5 (above) to extend the time for sale: *Re Gorham's Charity Trust*, [1939] Ch. 410. There would seem to be no doubt that the Charity Commissioners would have the like power of extension, as section 5 makes no distinction between the power given to the Court and to the Commissioners in respect of the extension of the period of postponement of sale and such orders are in fact made by the Charity Commissioners.

(c) The Court or the Charity Commissioners, if satisfied that the land is required "for actual occupation for the purposes of the charity and not as an investment", may make an order sanctioning the retention of the land devised to it (*ibid.*, section 8).

It seems that section 8 does not apply where the land has been given by will upon trust to sell it and pay the proceeds to the charity. There the position is governed to that extent by the directions in the will. It seems, however, that the Charity Commissioners could properly require a sale pursuant to section 6 (above) even if the trustees, having an express power to postpone the sale, delayed the sale in exercise of that power. The point is that the provisions of section 5 of the Act, directing a sale within the specified period, apply "notwithstanding anything in the will contained to the contrary": see *Re Sidebottom*, [1902] 2 Ch. 389.

(d) If personal estate is directed by will to be laid out in the purchase of land "to or for the benefit of any charitable uses" that direction is expressly negatived by the Act, and the personal estate will be held on trust for the charity as if the will had contained no direction to invest it in the purchase of land (section 7) subject as next mentioned. If, however, the charity desires to purchase land in accordance with the provision of the will for actual occupation for its own purposes application can be made under section 8 (clause (c) above). That section is not confined to the making of orders relating to the retention of land devised, but also authorises the making of orders sanctioning the acquisition of land directed by will to be purchased out of personal estate if it is required by the charity in question for actual occupation for its purposes and not as an investment.

PART II.

APPROVAL OF CHARITY COMMISSION.

It is proposed to deal with this subject under two headings. Heading A deals with Sales, Mortgages and Leases, and Heading B deals with Purchase of Land.

A. SALES, MORTGAGES AND LEASES.

1. Charitable Trusts Amendment Act, 1855, s. 29.

By section 29 of the Charitable Trusts Amendment Act, 1855, it shall not be lawful for the trustees of any charity to effect the following dealings with charity lands except under the authority of a statute, or of the Court, or according to a scheme legally established, or with the approval of the Charity Commissioners. The dealings in question are :

- (i) Sales.
- (ii) Mortgages or charges.
- (iii) Leases for a term exceeding twenty-one years, reversionary leases commencing more than three years after the expiry of any existing term, and leases for life.

Leases for life now, of course, take effect as leases for ninety years determinable on the lessee's death, as provided by the L. P. A., 1925.

There are, however, numerous statutory exemptions. Those which are most frequently encountered are as set out below.

2. Exemptions concerning Jurisdiction of Charity Commission and the Court.

The above prohibitions do not apply to the following :—

- (1) (a) Buildings registered as places of meeting for religious worship with the Registrar-General of Births, Deaths or Marriages in England or Wales, and *bona fide* used as such : Charitable Trusts Act, 1853, s. 62. It may be worth noting that it is often necessary to mortgage a building which is intended to be used for such a purpose before such registration can be effected. In that event there is no exemption under section 62.
- (b) Any forecourt, yard, garden, burial ground, vestry or caretaker's house in respect of situation connected with and held upon the same trusts as any such building registered and *bona fide* used as above mentioned; and any Sunday-school house or other land or building certified by an *Order of the Charity Commissioners* to be held on the same trusts as any such building registered and used as mentioned in (a) above, or upon like trusts, and to be *in respect of situation* so connected with or held or used in connection with such building that it cannot conveniently be separated therefrom : C. T. (Places of Religious Worship) Amendment Act, 1894, s. 4. It is thought that if the land or building in question were not

physically part of or physically so connected with the registered place of worship as to render it incapable of beneficial use independently of the place of worship (whilst used as such) it would not qualify for exemption under this present paragraph (b).

- (2) Cathedrals and Collegiate Churches, C. T. A., 1853, s. 62 : See *Re Dod*, [1905] 1 Ch. 442; *Re Stockport, etc., Schools*, [1898] 2 Ch. 687. Observe that by a proviso at the end of section 62, cathedral, collegiate, chapter and other *schools* are not included in this exemption.
- (3) The Universities of Oxford, Cambridge, London and Durham, any college or hall in such universities : C. T. A., 1853, s. 62.
- (4) The Colleges of Eton and Winchester : C. T. A., 1855, s. 49.
- (5) The Commissioners of Queen Anne's Bounty, the British Museum, and Friendly Societies and Savings Banks : C. T. A., 1853, s. 62.
- (6) Any institution, establishment or society for religious or other charitable purposes, and the ancillary or branch associations connected therewith, *wholly maintained by voluntary contributions*, and any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from the C. T. A., 1853 (so far as such business is carried on by means of voluntary contributions only) and the capital and stock of any such business : C. T. A., 1853, s. 62.

For the meaning of "wholly maintained by voluntary contributions" see the brochure by Mr. A. H. Withers on "Mixed Charities", published by the Solicitors' Law Stationery Society (c) and *Re Clergy Orphan Corporation* [1894] 3 Ch. 145. Briefly that phrase refers to charities which are absolutely dependent on gifts received from time to time, whether of a regularly recurring nature or not, and have no *invested* funds of any kind (whether consisting of real or personal property). Although even the ownership of a leasehold interest in premises or the ownership of any personal property (*e.g.*, cash received as "voluntary contributions") would constitute "endowment" as defined by section 66 of the C. T. A., 1853, it is clear that no charity whatsoever could claim exemption as a charity "wholly maintained by voluntary contributions" if the test were whether the charity had any property which came within the above mentioned definition of "endowment", for even money received as voluntary contributions (being personal property) is within that definition. However, immediately any voluntary contributions were *invested* in property producing or capable of producing income the charity could no longer be said to be "wholly maintained by voluntary contributions".

(c) I desire to acknowledge my indebtedness to that work in connection with the succeeding paragraphs of this article concerning "Mixed Charities", but any mistakes are my own.

But if moneys are received as voluntary contributions *legally applicable as income* and invested in real or personal property without fettering that property with any trust which would prevent the governing body from selling the investment and using the proceeds of sale as income then the investment may remain exempt from the jurisdiction of the Charity Commissioners: *Att.-Gen. v. Mathieson*, [1907] 2 Ch. 383, at p. 393. But in order to qualify for exemption from the jurisdiction of the Charity Commissioners the property in question (or the donation which it represents if it was not itself a donation) must have been acquired at a time when the charity *had already become* a mixed charity: *Re Child Villiers Application*, [1922] 1 Ch. 394. Unfortunately it is not clear at what stage a charity becomes a charity "maintained partly by voluntary subscriptions and partly by income arising from any endowment" so as to qualify for possible exemption as a "mixed charity". See further on this point the section "*Mixed Charities*" below.

- (7) The funds and property *not in England or Wales* of any missionary or other similar society or of any branch thereof.
- (8) Certain properties of mixed charities and certain donations or bequests in connection therewith: C. T. A., 1853, s. 62. The law on this subject is complex and in some respects uncertain, and is dealt with separately (see "*Mixed Charities*" below).

If the case falls within any of the exemptions above mentioned the consent of the Charity Commission to the disposition need not be obtained. It will, however, be necessary to ascertain the trusts upon which the charity holds the property and to make sure that the dealing proposed is in conformity with those trusts or the powers conferred by the trust deed or other instrument constituting the charity: see "*Mixed Charities*" below. It will be observed that if the consent of the Charity Commission to any dealing is necessary that dealing will be invalid unless such consent is obtained, even if the trust deed contains an express power of sale or (*semble*) trust for sale: see *Attorney-General v. National Epileptic Hospital*, [1904] 2 Ch. 252; *Re Mason's Orphanage*, [1896] 1 Ch. 596; *Attorney-General v. Mathieson*, [1907] 2 Ch. 383.

3. Mixed Charities.

It is unnecessary to repeat here the observations made in paragraph 2 (6) above concerning charities maintained wholly by voluntary contributions; but the remarks there made form a necessary introduction to this present section. The term "mixed charities" is not a term of art. It has, however, been customary to apply that description to charities which are maintained partly by voluntary subscriptions and partly by income arising from endowment. Not only are such charities themselves mixed, but the law concerning them is so mixed and complex that it has been thought necessary to deal with such charities separately, and not in conjunction with other

exemptions from the jurisdiction of the Charity Commissioners as set out above. Practitioners will find much useful information on the subject of Mixed Charities in the brochure written by Mr. A. H. Withers under that title and published by the Solicitors' Law Stationery Society (reproducing articles published in 69 Solicitors Journal, pp. 133, 155, 170, and 188).

By section 62 of the Charitable Trusts Act, 1853, it is provided as follows :—

- (a) "Where any charity is maintained partly by voluntary subscriptions and partly by income arising from endowment [*i.e.*, from *any* property of whatsoever nature belonging to the charity : see section 66 and *Re Clergy Orphan Corporation*, [1894] 3 Ch. 1457] the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only to the exclusion of voluntary subscriptions and the application thereof".

That is what the section says; but it does not appear to have been the practice of the Courts to treat the jurisdiction of the Commissioners as limited to *income*; and it has certainly not been their settled practice to give full effect to the concluding words as to the *application* of voluntary subscriptions which must mean the investment thereof and, presumably, the variation of such investment : see *Attorney-General v. Mathieson*, [1907] 2 Ch. 383.

There are several important points in connection with the exemption of property of mixed charities which should be kept firmly in mind :—

- (1) It is useless to rely on the preceding paragraph (a) alone. The subsequent paragraphs containing the further provisions of the section (as set out below), must also be considered.
- (2) The fact that a charity is *now* a mixed charity does not of itself confer any exemption upon it or its property.
- (3) The exemption can only exist in respect of specific gifts or the investments representing those gifts.
- (4) No property can be exempt from the jurisdiction of the Commissioners if the charity in question was not a mixed charity at the date when the donation out of which the property was purchased was made. As will be seen later, that does not mean that every property purchased by a mixed charity out of a donation or donations made whilst it was a mixed charity *is* so exempt.

Section 62 proceeds as follows :—

- (b) "And no donation or bequest unto or in trust for any such charity as last aforesaid [*i.e.*, a mixed charity] of which no special application or appropriation shall be directed or declared by the donor or testator, and which may [accordingly] legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board [*i.e.*, Charity Commissioners] or the powers or provisions of this Act".

Observe that this is not an exemption in respect of the charity as a whole but of a particular donation and its application.

The Courts would appear to have treated these words as meaning what they say only in cases where the donation or bequest is not subjected by the trustees to a trust under which the proceeds of sale of any investment(s) representing such donation or bequest are to be treated as capital: see *Attorney-General v. Mathieson* below. The section itself requires only that the donor should not have fettered the donation (or bequest) with directions as to the application thereof. It is submitted that the word "accordingly" which has been placed within brackets above merely assists in the construction of the words of the section, though the Court of Appeal in the *Mathieson Case* do not appear to have been of that opinion: see below.

If the trustees *later* resolved that the proceeds of sale of investments representing the donation should be treated as capital there would presumably be nothing to prevent them from rescinding that decision and thus making the investment(s) representing the donation once more available as income.

- (c) "And no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act".

It is clear that the donation or bequest mentioned in the above clause (c) is a donation or bequest in favour of a mixed charity, and it seems probable that the reference is to cases where (i) the donor has not directed some application of the donation, and (ii) the donation is available as income (as in clause (b)). Clause (c) could hardly apply unless conditions (i) and (ii) existed.

It was recognised by Davey, L.J., in *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, that the effect of the provision above set out is that notwithstanding that the trustees may appropriate an exempted donation for some specific purpose (even if the intention is that the appropriated investment shall form a permanent fund or endowment) such an investment is still exempt from the jurisdiction of the Commissioners (see the extract from the judgment of Davey, L.J., below). Note, however, the limitation which has, in effect, been placed upon this section by the case of *Attorney-General v. Mathieson*, [1907] 2 Ch. 383, as explained below.

In *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, at p. 151, Davey, L.J., expressed the opinion in connection with charities maintained "partly by voluntary subscriptions and partly by income from any endowment" that section 62 exempts from jurisdiction every donation or bequest for the general purposes of a mixed charity which is given on such terms that the capital may legally be applied for the maintenance of the charity, but leaves subject to jurisdiction an endow-

ment for general purposes the income only of which is applicable to maintenance. Davey, L.J., proceeded as follows: "We are further of opinion that if the exempted donation or bequest or any subscriptions are in fact invested by the governors with the intention that they shall form a permanent fund or endowment such investments and the income thereof are exempt from the jurisdiction and such income is excepted from the income from endowment". It must, however, be pointed out at this stage that since the decision in *Attorney-General v. Mathieson*, *supra*, and which is referred to more fully later, the statement in the last sentence cannot be accepted without qualification as mentioned below.

Davey, L.J., then referred to the special words of section 62 as to donations, bequests and voluntary subscriptions which have been invested, and stated that the effect is that the governing body, by appropriating for some specific purpose and investing a donation or bequest or any subscription which would otherwise be exempt, do not bring such appropriated endowment or the income thereof within the jurisdiction. Here again the case of *Attorney-General v. Mathieson*, *supra*, would appear to have rendered necessary the qualification mentioned later.

In the *Clergy Orphan Corporation Case* the funds of the charity could be dealt with for the purposes mentioned in the Act and for any other purpose relating to the corporation and for its benefit at their discretion, and the view was taken by the Court of Appeal that when certain consols were sold and invested in the purchase of land "the retention of the land was not essential to the existence of the charity, for the corporation might have bought or erected schools elsewhere or a site for other schools which might have been given to them, and in these circumstances the Court thought that the funds did not cease to be legally applicable as income at the discretion of the governors. Accordingly the Court held that the proceeds of sale of the land were still applicable as income for the general purposes of the charity and therefore exempt from the jurisdiction of the Commissioners.

The Court refused to express an opinion as to cases where the charity had no subscription list and relied for maintenance wholly on income of endowments derived from voluntary donations for its general purposes in past years which had been invested and capitalised, but laid down the following rules:—

- (1) That income of any endowment *prima facie* means income derived from any invested funds;
- (2) That in the case of a charity partly maintained by voluntary subscriptions and partly by the income of any endowment, bequests and donations for the general purposes of a charity which may be lawfully applied as income consistently with the terms of the gift are exempt; and
- (3) Such gifts and the income thereof are not brought within the jurisdiction by being invested by the governing body.

The Court did not, however, express any opinion as to the effect of the execution of a trust deed concerning any part of its property purchased out of moneys applicable as income if it were clear from the trust deed that upon the sale of that property the proceeds of sale were to be treated as capital. On this point see the observations on the decision in *Attorney-General v. Mathieson* below. Before passing to

that case, it will be desirable to mention certain special features in connection with the *Clergy Orphan Case* which we have just been considering.

The facts in the *Clergy Orphan Case* were as follows. A charitable corporation, which was partly supported by voluntary subscriptions and partly by the income of endowments, invested a fund, derived from voluntary contributions, towards the general purposes of the charity, in the purchase of land. They afterwards sold part of the land to a railway company. The Charity Commissioners claimed that the purchase money should not be paid to the corporation without the consent of the Commissioners.

The first point, and perhaps the most important one, is that the moneys used for the purchase of the land were derived from voluntary subscriptions (or contributions) and donations available for the general purposes of the charity and which could undoubtedly have been applied as income. Those voluntary subscriptions and donations had meanwhile been invested in consols, and the consols were sold in order to provide the purchase price of the land. Secondly, the land was bought under the powers conferred upon the charity by their Act (49 Geo. 3. c. xviii), which gave the charity power to purchase land, but no express power to sell it.

It would therefore seem that until any step is taken by a charity which prevents an exempted donation (made at a time when the charity was a mixed charity) from being applied as income, the mere investment of the donation in land, shares, stock or other forms of investment will not preclude the charity from disposing of such land, shares or other investment without the consent of the Charity Commissioners. What "step" will render it necessary to obtain such consent? For the answer to that question we may turn to the decision of the Court of Appeal in *Att.-Gen. v. Mathieson*, [1907] 2 Ch. 383, in which the following propositions were laid down by Cozens-Hardy, M.R. (at p. 393) :—

(1) No charity can claim the benefit of the particular clause which was construed in *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, unless it is a charity maintained partly by voluntary subscriptions, and partly by income arising from endowment. In other words, it must be what has been called a "mixed charity".

(2) In the case of a mixed charity, a donation, which would otherwise be an endowment of which no special application or appropriation shall be directed or declared by the donor, and which may be legally applied as income in aid of voluntary subscriptions, is not subject to the Act.

(3) So long as property, which may be applied as income, is invested, whether in real or personal property, so that it is still legally competent to the governing body to convert the investment into money and apply the money as income, such investment will in like manner be exempt from the Act.

(4) If by reason of some subsequent transaction it is no longer competent to the governing body to apply the investment as income, there is nothing in *Re Clergy Orphan Corporation*, *supra*, which justifies the contention that the investment is exempt from the Act. (On this point see the criticism in paragraph 4 below.)

(5) It seems impossible to hold that an application which would involve a breach of trust, and might be restrained by the Court, in any way resembles the case of *Re Clergy Orphan Corporation*, where the powers of the corporation remained unaffected by anything subsequent to the investment. (But see paragraph 4 below.)

(6) A charity cannot be said to be "wholly maintained by voluntary contributions" and therefore exempt from the Act, if it has freehold premises used for the purposes of the charity.

Pausing here, I must make it clear that the property concerning which the question of the jurisdiction of the Charity Commissioners arose had been purchased out of moneys which could undoubtedly have been applied as income. A trust deed had, however, been executed after the purchase of the property.

Cozens-Hardy, M.R., proceeded as follows: "If the above propositions are correct I think the contention of the trustees cannot be supported. I assume in their favour that their charity is a mixed charity, though I doubt whether this assumption is justified. They do not, and cannot, challenge the validity of the trust deed under which they are acting, and it is plain that it would be a breach of trust to apply the proceeds of the sale of the house as income. Even if Mr. Wilkinson [who originally collected the moneys] could originally have done this, they are now bound [under the trust deed] to treat the proceeds of sale as capital, and invest it accordingly. There is, moreover, a further difficulty in the way of the trustees. When money is given by charitable persons for somewhat indefinite purposes, a time comes when it is desirable, and indeed necessary, to prescribe accurately the terms of the charitable trust, and to prepare a scheme for that purpose. In the absence of evidence to the contrary, the individual or the committee entrusted with the money must be deemed to have implied authority for and on behalf of the donors to declare the trusts to which the sums contributed are to be subject. . . . And it is irrelevant to urge that the donors did not originally give any express directions on the subject, or that it might have been competent to the individual or the committee to have dealt with the sums contributed as income".

It seems clear therefore that the test concerning the lawfulness of a transaction and the question whether the consent of the Charity Commissioners is necessary will depend (so long as the *Mathieson Case* stands) not merely on the applicability of section 62 or other exemptions but also on the terms of any trust deed which may have been executed in relation to the property in question.

4. Criticism of Attorney-General v. Mathieson, *supra*.

Although the practitioner may safely assume that the Charity Commissioners are at present acting upon the decision in the *Mathieson Case*, *supra*, it seems that the Court of Appeal considered that the question whether the proceeds of sale of the property could be applied as income without a breach of trust was material to the question whether the property was exempt from the jurisdiction of the Charity Commissioners. With respect it is submitted that the question of exemption is to be determined according to the question whether the *donation was made* upon the footing that it could legally be applied as income, and

that the resolution of the trustees that upon any sale the proceeds are to be treated as income has nothing to do with the question whether the donation is one which is exempt from the jurisdiction of the Charity Commissioners. Such an interpretation is strictly in accordance with the words of the section : see clause (b) of paragraph 3 above. Moreover, in the *Mathieson Case* no mention is made of the subsequent words of section 62 which declare that no portion of such a donation which is appropriated . . . to some definite and specific object or purpose shall be subject to the jurisdiction or control of the said Board (see clause (c)). It would therefore seem that even after such appropriation unless it is clearly stated in, or deducible from, the provisions of a resolution passed by, or a trust deed created by, the trustees or managing body of the charity that the proceeds of sale of the appropriated property are to be applied as capital and not as income the exemption from jurisdiction is not affected. So much may indeed be stated upon the authority of *Re Clergy Orphan Corporation* : see the passage above cited from the judgment of Davey, L.J. Nor, it is thought, can it be denied that such a resolution could be rescinded. And it is further submitted that pursuant to such further resolution any such trust deed might be varied and the proceeds of sale declared to be available as income even if the resolution or trust deed had rendered them available for the time being as capital and not as income. But that view cannot be supported by authority. It may therefore be thought desirable, when settling resolutions or trust deeds making property available henceforth as capital only, to qualify such a provision by words making it clear that the resolution or trust deed may at any time be varied so as to permit of the application of the property or the proceeds of sale thereof as income for the general purposes of the charity. It is further contended that (conformably with the words of the section) the exemption extends to the donation or bequest howsoever invested, and that the question whether a dealing can be restrained *as a breach of trust* is entirely different from the question of the jurisdiction of the Commissioners in relation to such a donation or the funds or property representing it. In that respect it is submitted that a purchaser should not be and *is not* concerned to inquire whether the proceeds of sale will in fact be applied as capital. In point of fact the trustees might quite conceivably be able and willing to certify that the proceeds *would* be treated as capital (so that no breach of trust would arise). If in the *Mathieson Case* counsel for the trustees had stated that the proceeds would be applied as capital it is possible that the Court would still have taken the same view, but it could presumably only have done so upon the assumption that the position must be looked at as at the time of the proposed sale of the property. It has since been held that the question whether a donation *may* be exempt under the section as being a donation of the specified kind to a mixed charity depends upon whether the charity is mixed at the date of the donation : *Re Child Villiers Application*, [1922] 1 Ch. 394. So, when a suitable case arises for the consideration of the point of time to which regard is to be had in considering whether a given property (representing a gift originally applicable as income) is subject to the jurisdiction of the Charity Commissioners, it will no doubt be held that the material time in that connection also is the date of the gift and not any subsequent

date, such as the date when a dealing is proposed to be effected, or just after (or just before as it may prove) a resolution or trust deed under which the premises or other investments representing the original donation have ceased to be applicable as income. The point is that section 62 expressly enacts that the setting apart or appropriation of an exempted donation for any defined and specific object or purpose is not to subject that donation to the jurisdiction of the Charity Commissioners. If the wording of the last four sentences is considered in detail it will, I think, be seen how illogical it is to treat the question of exemption as being in any way dependent upon the subsequent dealings by the trustees with the donation or upon subsequent resolutions passed or trust deeds executed by them. If the application of the proceeds of sale as income would be a breach of trust (according to the situation at the material time) it may well be that such application could, *like any other breach of trust*, be restrained; but that point has no connection with the question of jurisdiction in the matter of consent to the sale of the property (d).

Meanwhile, as the Charity Commission will rely upon the *Mathieson Case*, the practitioner must treat that case as correctly laying down the law, and must reject such of the views expressed in these critical remarks as conflict with the propositions in that case as set out under "*Mixed Charities*" in paragraph 3 above.

5. Statutory Powers of Disposition and Acquisition.

In so far as charities lacked powers of sale prior to 1926 those powers were supplemented or supplied by section 29 (1) of the S. L. A., 1925 (which applies to then existing as well as future trusts). By that sub-section land vested or to be vested in trustees upon charitable, ecclesiastical or public trusts is to be deemed *for the purposes of that section* to be settled land. The trustees are thereby given the powers of a tenant for life and of the trustees of a Settled Land Act settlement; but they are not subjected to the technical rules affecting "statutory owners". The instrument creating the trust is deemed to be the settlement, *but unless the trust is created by will coming into operation after 1925* a separate instrument is not necessary for giving effect to the settlement, *i.e.*, a vesting deed is unnecessary before the Settled Land Act powers are exercised (section 29 (1)). By the same sub-section a conveyance of land held on charitable, ecclesiastical or public trusts must state that the land is so held, and a purchaser who has notice of such trust must see that any requisite consent or orders have been obtained (*e.g.*, of the Charity Commissioners, the Board of Education or the Court) (section 29 (1)). "Conveyance" for this purpose includes a mortgage, charge by way of legal mortgage, lease, assent, vesting declaration, vesting instrument, disclaimer, release, and every other assurance of property or of an interest therein by any instrument, *except a will* (section 117 (1) (v) of the S. L. A., 1925). That definition obviously includes an assignment of a lease. No penalty is imposed in respect of the failure to state in such a conveyance

(d) It may be conceded that if the trust deed contained a provision that the property comprised in it should not be sold without the consent of the Charity Commissioners the Court would be justified in restraining a sale if that consent had not been obtained; but that is an entirely different matter.

that the property is held on charitable trusts, and as a purchaser is only affected if he has notice, the direction would appear to have no practical effect if it is ignored and the purchaser or mortgagee has no notice of the trusts.

As to the powers conferred by section 29 (1) see further paragraphs 9 and 10 below.

[*To be continued.*]

CORRESPONDENCE.

We have received the following letter from a subscriber:—

With reference to your form on page 274 of the December issue, we are interested in it as we think it was put in as a result of an inquiry we made of you, but we suggest that it is not complete. Pressure of work is such that we have not been able to check it, but we have had a certain number of these cases, and we do not see for example a specific inquiry as to particulars of service agreements binding at law or otherwise with the company's officers or staff members. There may be other questions, but we cannot remember them all off hand.

Again we see no inquiries under the Emergency Legislation as to such matters as whether any member of the staff is entitled to reinstatement under Emergency Legislation between the company and its tenants, or as rights under the Civil Defence Act, Landlord and Tenant (War Damage) Acts, etc., nor inquiries as to whether Board of Trade consents to borrowings, etc., have been obtained under the Defence Finance Regulations.

Our Contributor writes as follows:—

With regard to your correspondent's letter, as you know when I sent you the form I expressly mentioned that it was not necessarily exhaustive and in any case the question of what should be included in a form of *Stock* questions is always open to argument.

My form, which was merely based on my experience, was intended to cover what I may describe as the "purely company" angle and as footnote (a) indicates I assumed that any appropriate preliminary investigation would have been made by the Purchasers.

In my experience such an investigation would extend to details of staff and if the Company had any tenants (a point which your correspondent apparently assumes would always be the case although obviously it is not necessarily so) the investigation would bring to light whether or not the premises let had suffered War Damage, and if so the position under the Landlord and Tenant (War Damage) Acts.

With regard to rights under the Civil Defence Act, if the Company is concerned, all necessary arrangements would have been made long since and any payments made by the Tenants would appear in the Company's accounts which, (apart from the fact that my form asks for certified copies) would normally have been inspected by the Purchasers as part of the preliminary investigation.

With regard to Board of Trade consents to borrowing, my form asks for the disclosure of all mortgages, and subsequent examination of the originals under Clause 11 would show if they had been duly stamped and registered under Sec. 79 of the Act. If they had where is the query? In my experience it is impossible to stamp a Mortgage in respect of which Treasury Consent is required unless the consent is produced at the time.

Finally, the suggestion that my form does not include any inquiry as to the existence of Service Agreements is wrong and I refer them to Clauses 1 (i) and 10 (e).

It must be borne in mind that the *Stock* form is drawn on the assumption that some sort of bargain (subject, of course, to contract) has already been struck between the parties, and accordingly, it cannot be assumed that this state of affairs exists without the intending Purchaser having made an intelligent preliminary investigation of all obvious material points.

NOTES OF RECENT CASES.

1. PROPERTY AND CONVEYANCING CASES.

Presumption of advancement—property bought in name of daughter—retention of title deeds.—*Warren v. Gurney*, [1944] 2 A. E. R. 472, does not contain any new principle of law, but it does illustrate the attitude of the Court towards transactions of somewhat frequent occurrence. On the eve of his daughter's marriage the father bought a house in which the daughter and her husband were to live and took the conveyance in the daughter's name. The father retained the title deeds, and after the death of the father the daughter claimed the house as a gift and the title deeds from the father's executors.

The case was heard before a County Court Judge who heard certain oral evidence, but rejected a document beginning "my wish" made by the father which came into existence after the date of the transaction. The Court of Appeal upheld the rejection on the ground that donors could manufacture evidence of their intentions after the date of the transaction. To this there is an exception that if the document is against the interest of the donor it would be admissible. The report does not indicate the character of the contents of the document.

The Court, in holding that the presumption of advancement in favour was rebutted, laid stress on two things. First, that the father had retained the title deeds, which would have been handed over to the daughter had a gift been intended. Secondly, upon the oral evidence of what was said between father and son prior to the purchase of the property. The principle was stated by Morton, L.J. (at p. 474) as follows: "It is quite clear that contemporaneous declarations by the alleged donor are admissible in evidence".

Dogs Act, 1906—whether rabbits are cattle.—Under the Dogs Act, 1906, the owner of a dog is liable for damage to cattle whether or not he had knowledge of any tendency to attack. The purpose of the Act was to avoid the difficulty emphasised in the case of *Buckle v. Holmes*, [1926] 2 K. B. 125, where it was held that the owner of a cat was not liable for the cat eating his neighbour's pigeons, because it was not possible to control cats entirely and it was not inherent vice. In *Tallents v. Bell and Goddard*, [1944] 2 A. E. R. 474, the question arose out of dogs attacking rabbits kept for commercial purposes. The Court of Appeal held that on the evidence there was no knowledge on the part of the owners of the dogs of a propensity to attack rabbits, although they were following the common instincts of their kind, and consequently they were not liable at common law. The rather peculiar position seems to be that, since *Buckle v. Holmes* (*supra*) at least, the plaintiff cannot recover at common law for damage which any owner of dog or cat might have expected unless the owner knew that his animal had committed it before. Exactly how the learned Judges say that the principle is one of *scienter*, which applies to a known vice peculiar to the animal such as biting human beings, is not very apparent, but the essential point is that in dogs and cats *scienter* includes known damage of a kind which the animal may commit but it is not known that he has. It should be added that the Court firmly declined to differentiate between classes of dogs for their propensities.

Secondly, the Court held that rabbits kept for commercial purposes were not cattle for the purposes of the Dogs Act. The Act specified certain

types of animal which were deemed to be cattle, but, though some were not cattle in the ordinary sense, none of the types came near to rabbits.

Special powers—exercise by will—what constitutes an intention to mix.—In order that a special power shall be exercised by deed or will it is necessary that there shall be sufficient expression in the instrument of an intention to exercise the power. The Wills Act does not affect this question and hence the law is the same for deeds and wills. In *Re Holford's Settlement*, [1944] 2 A. E. R. 462, Vaisey, J., had occasion to review a list of authorities on the necessary expression of intention and the case is further interesting for the distinction between general and special powers. Under section 27 of the Wills Act, 1837, a general power will be exercised apart from any contrary intention expressed in the will.

In *Re Holford's Settlement* (*supra*) under a settlement the testatrix had, subject to her life interest, a special power in favour of her issue with a gift over in default of appointment to children, and this was followed by a general power of appointment in the event of failure of the preceding trusts. There was also a special power in favour of the husband.

By her will she gave the residue of her property "whatsoever and wheresoever both real and personal of or to which I shall be seised possessed or entitled at my death or over which I shall then have power of appointment or disposition by will including all property (if any) in which I may have an entailed interest in possession" to trustees upon trust for sale and beneficially to her husband for life and subject thereto to be divided among her children, but settled in such a way that some of the limitations offended the perpetuity rule. Vaisey, J., held that the special powers were not exercised, though the general power, if and so far as the trusts might become effective, was exercised.

The analysis of the cases by Vaisey, J., is too long and detailed for this note, but the learned Judge expressly called attention to the judgment of Morton, J., in *Re Beresford*, [1938] 3 A. E. R. 566, in which a similar result was reached and in which Morton, J., said, after referring to the cases: "but if there is any difficulty in reconciling the two groups of cases [*i.e.*, those in which analogous expressions did or did not exercise the power], I should prefer to follow that in *Re Cotton*, *Re Weston's Settlement*, and *Re Sanderson*".

The reasons which influenced the learned Judge in coming to the decision he did, based upon this line of authority, he expressed as follows: "I find there, as was found in *Re Sanderson*, [(1912) 106 L. T. 26] a perfectly clear blending together of that which the testatrix thought that she was disposing of and a large number of provisions for the payment of debts, the payment of legacies, for investment, for postponement of sale and conversion, all of which are utterly and completely inapplicable to the property which was the subject of the settlement of May 18, 1928. I do find an intention to give an income to the husband for his lifetime, but I find no hint or suggestion, in giving him that, that she was bound to subject him to conditions of forfeiture [as were required in the settlement]". The learned Judge then went on to point out that some of the limitations in favour of the children were inconsistent with the exercise of the special power since they would be void for perpetuity.

In effect the Courts are now disinclined to construe general words purporting to exercise powers of appointment as exercising special powers where the nature of the gifts are not entirely consistent with such an intention, or alternatively the property or the instrument creating the

power is mentioned: cf. *Re Ackerley*, [1913] 1 Ch. 510. It seems to be incumbent upon solicitors, where any such general words are used, to inquire concerning the possibility of such special powers and take pains to incorporate them more definitely. Whether any real difference would arise by the use of the words "powers of appointment whether special or general" it is rather difficult to forecast, but it does seem to be absurd that the testator cannot exercise a special power as part of the total disposition. (2 K. & E. p. 872, n. (a).)

Charity—educational trust for education of lawful descendants of three specified persons—Re Compton, [1944] Ch. 378 (noted *ante*, p. 86) has been overruled by the Court of Appeal, [1945] 1 A. E. R. 198. The essential feature of the judgment of Lord Greene, M.R. (in which the other members of the Court concurred) was the stress laid by his Lordship on the public character of charitable trusts.

The Court held that a perpetual trust of income for the education of the members of a family was a private or family trust and though a trust for educational purposes was not charitable. In the first place the learned Judge said (at p. 202) that the statement in *Tudor on Charities*, 5th ed., pp. 30, 31, that "bequests for the education of the donor's descendants and kinsmen at a school or college" are charitable was not supported by the authorities, but in this respect he distinguished the validity of "founder's kin" scholarships or fellowships. The learned Judge also disapproved the decision of Eve, J., in *Re Rayner* (1920), 86 L. J. Ch. 369, where it was held that a trust for the education of children of employees of a company was charitable. Indeed, Eve, J., had said in that case that the gift was "limited to a section of the public, but the section intended to be benefited was sufficiently defined". It would seem to require to be a locally limited section of the public, as in *Re Baynes* (noted above), and not limited by another description. This might fit the case of *Re Leverhulme*, [1943] 3 A. E. R. 144 (noted, vol. 8), in which a staff training college was held not to be charitable. Nevertheless, we think that the expression "public" in this connection will require some further definition. If it does not mean that any member of the public may be able to benefit, as, for instance, to seek relief if impoverished, it would seem that any fund which increases education would benefit the public. But this view was definitely rejected (at p. 205) on the ground that a testator (or presumably a settlor) could provide for his family and escape income tax by creating a trust for education. It is this kind of conflict between public interests that makes the term "public" doubtful in its content, the more so when not all trusts that are public are charitable.

One other important point was dealt with, namely, the position of the "poor relations" cases, that is, the decisions upholding as charitable gifts to benefit the donor's poor relations. It would, of course, be difficult to support these gifts as public in any sense of the word as used by the learned Master of the Rolls, but his Lordship traced all the decisions to *Isaac v. Defriez* (1754), Amb. 595, and *Att.-Gen. v. Price* (1810), 7 Ves. 423, and expressed the opinion that to-day these cases would be decided differently were they still open. At the same time his Lordship was prepared to regard them as established law, but anomalous and not to be extended.

It is thought that much more will be heard of the principle of "public trusts" in connection with charities, but in the meantime any family educational trusts will require drafting as for "quasi-charities" (see *ante*, p. 104).

Entailed interests—"male heirs".—There was a point in *Re Compton* (*supra*) reported in [1944] 2 A. E. R. 255, but not elsewhere, that should, perhaps, be mentioned, but was not noted in the last number in the hope of a more adequate report. The property not settled upon the educational trust was directed to be held for "A and his male heirs" or, at least, it would seem so from the report. The property was personalty, but as the testatrix died after 1925 an entailed interest was possible under the Law of Property Act, 1925, s. 130 (1). This section requires that an entailed interest in personalty (or realty) can only be created by deed or will by words appropriate to an entailed interest in deeds prior to 1926, save where the instrument created an executory as distinct from executed trust, which was provided for by L. P. A., s. 130 (2). The learned Judge held that section 130 (2) was not applicable, but that an entailed interest was created under section 130 (1). It is unfortunate that the case is not more adequately reported because it would be an example of the exception to the strict rule laid down so early as Co. Litt., f. 13a, that superadded words to the word heirs (without the addition of "of his body") create a fee simple interest and cannot create an entail. It is true that in rare cases (see *Beresford's Case*, 7 Co. Rep. 41), the words "of the body" can be supplied by the context, but modern cases hardly seem to exist.

Contract for sale—commission where sale goes off—quantum meruit.—In *Jones v. Lowe*, [1945] 1 A. E. R. 194, a vendor employed the plaintiff to sell her house. Before the contract was signed the vendor withdrew from it. In the meantime the plaintiff had written a letter to the vendor which said "in the event of my introducing a purchaser I shall look to you for the payment of the usual commission". The plaintiff sued for commission as on completion of the sale or in the alternative upon a *quantum meruit*. Hilbery J. held, upon his interpretation of *Luxor Ltd. v. Cooper*, [1941] A. C. 108 (noted *ante* vol. 5, p. 294), that the plaintiff could recover nothing on the contract to introduce a purchaser since the sale had not been completed, and that he could recover nothing on a *quantum meruit* since the contract was reduced into writing so that there could be no implied term to pay on a *quantum meruit*.

3. LANDLORD AND TENANT CASES.

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

Rent Restrictions Acts—statutory tenancy—obligation to provide central heating and hot water.—Where a landlord determines the contractual tenancy of a dwelling-house to which the Rent Restrictions Acts apply, and the tenant holds over by virtue of the Acts as statutory tenant, then by section 15 (1) of the Act of 1920 he is entitled to the benefit of all the terms and conditions of the original contract of tenancy as far as they are consistent with the provisions of the Acts.

Where those terms and conditions have included an obligation to provide such services as central heating and hot water, the result has often been a considerable hardship upon the landlord under war-time conditions, for however difficult and expensive it has become to maintain those services the Rent Restrictions Acts provide no machinery for their modification or for any increase of rent in respect of the increased cost of maintaining them. On the other hand the provision of such services is not regarded as

"attendance" within the meaning of section 12 (2) of the Act of 1920 so as to take the premises out of the Acts as being *bona fide* let at a rent which includes payments in respect of attendance: see *Wood v. Carwardine*, [1923] 2 K. B. 185.

In *Engvall v. Ideal Flats, Limited* (1945), 61 T. L. R. 210, an attempt was made to establish that the obligation to provide central heating and hot water was not imported into the statutory tenancy under section 15 (1) of the Act of 1920. It was suggested that under that section obligations which were *purely* contractual and outside the ordinary covenants of a lease were not carried over into the statutory tenancy. This argument was rejected by the Court of Appeal, who unanimously held that the expression "all the terms and conditions" of the original contract of tenancy meant exactly what it said and comprehended every obligation entered into in the contract of tenancy. The obligations to provide central heating and hot water were therefore imported into the statutory tenancy and the tenant was entitled to the benefit of them.

(Woodfall, 24th edition, p. 294; Rent Restrictions Guide, p. 62.)

Rent Restrictions Acts—two rooms let together with use in common with the landlord of garage, kitchen, bathroom, lavatory, coalhouse and conservatory—not let as a "separate dwelling".—The case of *Neale v. Del Soto* (1945), 61 T. L. R. 145, raises questions as to what parts of houses may be regarded as dwelling-houses within the meaning of the Rent Restrictions Acts.

In order that a part of the house may constitute a dwelling-house within the meaning of the Acts it must be a part which is let as a separate dwelling—see section 16 (1) of the Act of 1933. In *Neale v. Del Soto* the tenant had the exclusive use of two rooms of the house and also by the terms of his contract of tenancy a right to the use and occupation in common with his landlord of the garage, kitchen, bathroom, lavatory, coalhouse and conservatory. The tenant, on the footing that the two rooms were a dwelling-house within the meaning of the Acts, applied to the county court for an apportionment of the rent.

It was held by the Court of Appeal that the two rooms were not a dwelling-house within the meaning of the Acts. Considered by themselves, they were not let as a separate dwelling. Morton, L.J., expressed the matter in these words: "The real substance of the matter is that there was a sharing of this house, each party had the exclusive use of some rooms and the two parties together had the use in common of certain other rooms." The apportionment was therefore refused. Regarding the suggestion that on the same reasoning the letting of two rooms together with the use in common with the landlord of just the lavatory and nothing more would be outside the Act, Morton, L.J., expressed the tentative suggestion (he did not have to decide the point in that case) that possibly it was a question of degree.

The principles involved in this case merit some consideration. The application before the Court was to apportion a share of the rent to the two rooms, and on this footing it was rejected by the Court of Appeal. It is interesting to consider whether, in view of the very substantial nature of the rights granted to the tenant in respect of other parts of the house, the application would have stood a better chance of success had it not been so limited to the two rooms of which exclusive possession was actually given to the tenant. What was let to the tenant was exclusive possession of two rooms plus rights of user (enjoyed in common with someone else) in respect

of other parts of the house. It seems fairly clear that the totality of those rights amounted to a dwelling-house which was let to the tenant. Can it be said, however, to be a "separate dwelling" within the meaning of the Rent Restrictions Acts? It is submitted that it is, for although it makes use of some physical premises the use of which is common to other dwelling-houses under the same roof, it is as a dwelling identifiable and distinct from those other dwelling-houses, and it is occupied and enjoyed by the tenant as a separate entity.

To obtain an apportionment of the standard rent to determine the rent of this dwelling-house, it is necessary to show that the dwelling-house is "part of" the whole house within the meaning of section 5 of the Act of 1938. This raises a further question of some interest. Normally when an application is made for an apportionment in respect of part of a house the part can be seen by physical division of the whole into two or more sections. But the part we now have under consideration is not quite so simple. The two rooms of which the tenant has exclusive possession can be seen as a physical section of the house. What the tenant has in respect of the garage, kitchen, bathroom, lavatory, coalhouse and conservatory, however, is not a physical section of the house but part of the rights of user and enjoyment in respect of those rooms and offices. In order therefore to view this dwelling-house as "part of" the whole house the word "part" must be construed not as limited to the sense of physical division but as embracing also a share in the rights of user and enjoyment of those rooms and offices which are common to the occupiers of different sections of the house.

No opinion is hazarded as to whether the Court would accept the suggestions made above. They are advanced as a line of reasoning which it might be worth while to put to the test in a case where the house is divided up in this way. It is thought, however, that *Neale v. Del Soto* is to be taken cautiously as an authority, for apart from Morton, L.J.'s., hint that it might be a question of degree, it must be remembered that the decision is a decision only upon the actual application before the Court, which in that case was in respect of the two actual rooms only.

(Woodfall, 24th edition, p. 346; Rent Restrictions Guide, p. 18.)

Frustration of building lease—restrictions on building imposed under Defence Regulations.—The final stage of *Cricklewood Property and Investment Trust v. Leighton's Investment Trust*, in the House of Lords (1945), 61 T. L. R. 202, provides plenty of material for future discussion on the subject of frustration of leases. It had been commonly accepted that since the decisions in *London and Northern Estates Co. v. Schlesinger*, [1916] 1 K. B. 20, *Whitehall Court v. Ettlinger*, [1920] 1 K. B. 680, and *Matthey v. Curling*, [1922] 2 A. C. 180, the doctrine of frustration of contracts was completely inapplicable to leases, on the ground that a lease was something more than a contract, it was an actual conveyance of an estate in the land. Although circumstances beyond the control of the parties might frustrate one of the subsidiary intentions of the contract of tenancy, the main thing was the demise of land and this was able to take effect notwithstanding the frustration of some other purpose which the parties had in mind. In the *Cricklewood Property Case* both Asquith, J., and the Court of Appeal (see the note of the case in *The Conveyancer*, Vol. 7, p. 107) had accepted this principle as authoritative and taken it to its logical conclusion, applying it to a building lease the building purpose of which was for the time being frustrated by war-time restrictions.

Now the House of Lords has expressed divergent, in fact directly contradictory, opinions upon the question whether in principle there can possibly be frustration of a lease, though united in dismissing the appeal on the ground that even if a lease can in principle be frustrated the cases where the doctrine could apply to a lease must be extremely rare, and the present case was not sufficiently strong to justify applying the principle there. This was a ninety-nine years' building lease, and the war-time restrictions were not likely to prevent building for more than a comparatively short period of that long term. The interruption was not therefore such as to destroy the identity of the arrangement or make it unreasonable to carry it out as soon as the interruption in building was over.

However, two of the five members of the House hearing the appeal expressed the definite opinion that there was nothing in principle to prevent the doctrine of frustration applying to a lease, though cases in which it would apply must in the nature of things be extremely rare. And a third member of the House reserved the point without expressing a final opinion on it. Lord Simon examined all the authorities and then expressed the view: "A careful examination of the decided cases to which the Court of Appeal refers satisfies me that it is erroneous to suppose that there is authority binding on this House to the effect that a lease cannot in any circumstances be ended by frustration." He pointed out that in *Matthey v. Curling* the actual decision was that requisitioning by the Government was no answer to a claim on the covenant for rent; in *Whitehall Court v. Ettlinger* the primary decision was that the mere fact that the tenant was personally prevented from residing in the leased flat did not affect the existence of the chattel property vested in him under the lease; and in *London and Northern Estates v. Schlesinger* it was that a tenancy was not extinguished because the tenant for the time being was not allowed by law to inhabit the flat which had been leased to him. Any dicta in those cases suggesting that a lease can never in any circumstances be determined by events equivalent to frustration were not accepted by the Lord Chancellor, who stated definitely that such a proposition goes too far. As an example of the admittedly rare class of case where the doctrine of frustration might apply to a lease, he instanced a building lease in a case where subsequent legislation permanently prohibited private building in the area, or dedicated it as an open space for ever.

Lord Wright, after carefully examining the reported cases on the subject, expressed the same opinion as the Lord Chancellor. While recognising that a lease differs from an ordinary contract inasmuch as it creates an estate in land, he pointed out that the parties frequently provide in the lease for it to be brought to an end in certain contingencies. If this could be done by act of the parties, he suggested that it could come about by operation of law. "It is true," he said, "that there is no reported case in which the rule has been applied, and it could be applied only in rare and exceptional cases. But the doctrine of frustration is modern and flexible and is not subject to being restricted by an arbitrary formula. I am not therefore prepared to state as a universal principle that it can in no circumstances be applied to a lease."

Lord Porter was not so definite in his opinion, but still saw the possibility of the doctrine of frustration being applied to a lease. "Exceptional circumstances might conceivably arise", he said, "which could be plausibly put forward as a cause of frustration, and until it is necessary to pronounce definitely one way or the other I prefer to reserve the point."

Lord Russell of Killowen and Lord Goddard, on the other hand, both expressed definite opinions against the doctrine of frustration ever being applicable to a lease. Lord Russell said, "On the broader question I confess

that I am unable to grasp how the doctrine of frustration can ever apply so as to put an end to a lease and the respective liabilities of landlord and tenant thereunder. A lease is much more than a contract. It creates and vests in the lessee an estate or interest in the land, a chattel interest, it is true, but a vested estate or interest none the less." Lord Goddard, after mentioning that the opinion generally prevails in the profession that the doctrine of frustration does not apply to a lease, and pointing out the desirability of resolving any doubt on the subject, went on to say, "Whatever be the true ground on which the doctrine is based it is certain that it applies only where the foundation of the contract is destroyed so that performance or further performance is no longer possible. In the case of a lease the foundation of the agreement, in my opinion, is that the landlord parts for a term of years with his interest in the demised property which thereupon becomes vested in the tenant in return for a rent. So long as the interest remains in the tenant there is no frustration though particular use may be prevented". Lord Goddard then continued to point out some of the anomalous results which could follow from the application of the doctrine of frustration to a lease.

The matter therefore now rests in a state of uncertainty, with weighty opinions to be cited in support of either view. One definite observation may, however, be made without trepidation. The *Cricklewood Property Case* affords little comfort or encouragement to anyone desirous of applying the doctrine of frustration to a lease. The one thing upon which even the "pro-frustration" side of the House were unanimous was that it must be a very rare and exceptional case indeed to justify the invocation of the doctrine. There must be something in the nature of *total* frustration of the purpose of the lease, not merely frustration for a time. For this reason this interesting question, now suspended in a state of uncertainty, may be left for a long time as an academic speculation for debating societies to wrestle with.

(Woodfall, 24th edition, p. 342.)

Surtax—settlement—loans by settlor to trustees—repayment from income of trust fund—Finance Act, 1936, s. 21; Finance Act, 1938, s. 38—In Jenkins v. C. I. R. the Court of Appeal dealt with some interesting questions relating to section 21 of the Finance Act, 1936, which is concerned with settlements in favour of children, and section 38 (3) of the Finance Act, 1938, which is concerned with undistributed income arising under a settlement in which the settlor has, or is deemed to have, an interest. X had made an irrevocable settlement of a capital sum in favour of an infant child of his. The execution of the settlement was part of a complicated series of transactions including the formation of inter-connected companies under the settlor's control, the investment of the trust fund in the shares of one of these companies, and the making of an interest-free loan by the settlor to the trustees for the purpose of enabling them to subscribe for additional shares. The settlement expressly empowered the trustees to borrow money with or without security and to arrange for repayment out of the capital or income of the trust-fund. Dividends on their shares had been received by the trustees, and an amount equal to the amount of the dividends had forthwith been paid over by them to the settlor in reduction of the loan.

The question arising under section 21 of the 1936 Act was whether the settlement was, in the relevant sense, an irrevocable settlement. It is unnecessary to describe in detail the machinery of the scheme devised by the settlor. It is enough to say that (as could not be disputed) the settlor

had it in his power, by causing the companies to be wound-up, to steer the whole of the trust fund, by a devious route, into his own pocket. It was held, however, that power to destroy the trust fund could not, of itself, be said to amount to power to revoke the settlement, and that, the settlement being irrevocable in the ordinary sense of the term, must be treated as irrevocable for the purposes of section 21 unless it could be brought within the "deeming" provisions of sub-section (8) of that section. These are to the effect that a settlement is not to be treated as irrevocable "if the terms thereof provide" for payment of any income or assets to or for the benefit of the settlor (or his wife or husband) during the life of any child who is a beneficiary under the settlement. While it might well be said that the application of income of the trust fund in reduction of the settlor's interest-free loan to the trustees was a payment for his benefit, due weight must be given to the words "if the terms thereof provide", and these words, it was held, were not satisfied. Payments had, in fact, been made to or for the benefit of the settlor and those payments arose out of the exercise by the trustees of powers vested in them by the settlement, but it was not the case that the payments had been made because the terms of the settlement so provided. So far, therefore, as section 21 of the 1936 Act was concerned, the Crown's contentions failed. Different considerations arose with regard to the application of section 38 (3) of the 1938 Act, the question here being whether the settlor had, or must be deemed to have, an interest in the trust fund or its income within the meaning of the sweeping language of section 38 (4), which attributes an interest to the settlor if income arising under, or property comprised in, the settlement may become payable or applicable to or for the benefit of the settlor (or his or her wife or husband) "in any circumstances whatsoever". In the case under consideration, what the trustees had done with the income of the trust fund in the year in question was to apply it towards the reduction of the interest-free loan which they had had from the settlor. Whatever might have been the position if the loan had been of a different character—a point on which the Court expressed no opinion—it was indisputably clear that the repayment of a non-interest bearing loan was for the benefit of the settlor in the relevant sense. Hence income of the trust fund not merely could be but actually had been applied for the benefit of the settlor. Further than this, two of the three members of the Court made it clear that, in their opinion, the fact that income of the trust fund could, at the discretion of the trustees, be applied to the reduction of the loan was of itself sufficient to bring the case within section 38 (3), irrespective of whether it had, in fact, been so applied or not.

4. INCOME TAX CASES.

By LEONARD STEIN, Barrister-at-Law.

[The cases selected for notice are not necessarily the most important from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Income tax—tax-free annuity—trustees' interest in annuitant's reliefs and "post-war credits".—In *Re Tatham, Bank v. Mackenzie*, [1945] Ch. 34, a beneficiary under a will was entitled to "such a sum in every year as, after the deduction of income tax for the time being payable in respect thereof, will leave a clear sum of £350 to begin from my death and to be payable by equal quarterly instalments in advance". The main

question before the Court was whether the case fell within the well-known rule in *Re Pettit*, [1922] 2 Ch. 765, or, in other words, whether the annuitant was accountable to the trustees for a proportion of any repayments of income tax claimable by her in respect of reliefs and allowances, corresponding to the proportion borne by the amount of the annuity to the amount of her total income. In *Re Pettit*, above, the testator had used the simple formula, "free of duty and income tax". On these words it was held that what the annuitant was given by the will was an annuity of the stated amount and no more. Hence, the gross sum to be provided by the trustees was the sum which would leave the stated amount after deducting income tax at the rate at which it fell ultimately to be borne by the annuitant after taking into account her reliefs and allowances. *Re Pettit* was distinguished in *A. Jones*, [1933] Ch. 842, where the gift was one of "such an annuity as after deducting therefrom income tax at the current rate for the time being would amount to the clear yearly sum of £— free of duty". It was held that the words "current rate" must be taken to mean "standard rate" and that accordingly the trustees' obligation was to provide a gross sum of such amount as, after deduction of income tax at the full standard rate, would leave the stated amount, any repayments of tax to which the annuitant might be entitled being retainable by her for her own benefit. In *Re Maclellan*, [1939] Ch. 750, the Court had to decide on which side of the line to place a provision in a deed for the payment to one of the parties of "such an annual sum as . . . would . . . after deduction of income tax but not surtax leave in her hands the sum of £— clear of all deductions for income tax but not surtax". The Court of Appeal, approving both *Re Pettit*, above, and *Re Jones*, above, held that, on the true construction of the language used, the case fell within the rule in *Re Pettit*, and that accordingly the recipient of the annual sum must account for the appropriate proportion of tax repaid in respect of her reliefs and allowances.

In *Re Tatham*, above, Evershed, J., having reviewed the three decisions just mentioned and the principles underlying them, reached the conclusion that the rule in *Re Pettit* applied. The true construction of the testator's words "income tax . . . payable in respect thereof" was—it was held—that they referred to the tax payable in respect of the annuity by the annuitant—i.e., the tax to which she was ultimately found to be liable after taking her reliefs and allowances into account. Pointing out that it was clear from *Re Jones*, above, that the addition of words pointing clearly to the standard rate of tax was not mere surplusage, the learned Judge observed that where a reference to the standard rate was not indicated by express words, the Court would not lightly draw the inference that this was what was intended.

A subsidiary question arose as to whether the application of the rule in *Re Pettit* extended to what are colloquially known as "post-war credits". The answer was in the affirmative.

Income tax—testamentary tax-free annuity—Finance Act, 1941, s. 25.— In *Re Berkeley; Borrer v. Berkeley*, [1945] 1 A. E. R. 83, the salient facts—omitting immaterial details—were, briefly, as follows: A testator had bequeathed to his wife "an annuity of the amount required to make up to the total sum of £5,000 clear of all death duties and income tax the annual net income to be received by her" under his will and under his marriage settlement. The bequest was contained in a codicil made before September 3, 1939. By a further codicil made after September 3, 1939, the testator confirmed his previous testamentary dispositions and directed that his wife's

annuity should be payable in priority to all others and charged that annuity on certain specified property.

On these facts a number of questions arose as to the application of section 25 of the Finance Act, 1941, which provides, as is well known, for the reduction of the net amount payable in respect of a tax-free annuity to twenty twenty-ninths of the "stated amount", where the provision for the payment of the annuity was made before September 3, 1939, and has not been varied on or after that date. Following its decision in *Re Sebag-Montefiore*, [1944] 1 Ch. 331, the Court of Appeal held that, the annuity having been bequeathed by a codicil made before September 3, 1939, the mere confirmation of the bequest by a further codicil made after that date did not take the case out of section 25. The next question to be considered was whether there could be said to be a "stated amount" in a case in which the trustees were directed to make up the annuitant's net income to a specified figure, so that the amount to be paid in a given year would depend upon the amount of the annuitant's income for that year from other sources. On the principle of *id certum est quod certum reddi potest*, the Court of Appeal had no hesitation in holding that the words "stated amount" were satisfied where there was a formula by reference to which the amount to be paid could be fixed in each successive year by a simple arithmetical calculation. In other words, a "stated amount" is not necessarily an amount certain. It was contended in favour of the exclusion of section 25 that the codicil made after September 3, 1939, had "varied" the provision contained in the earlier codicil both by directing that the wife's annuity should be paid in priority to all others and also by charging it on certain property. It was held that even if there might be room for doubt as to where a variation must be considered to begin, it was clear that the mere giving of priority and the addition of security did not of themselves amount to a variation within the meaning of section 25, where, as here, the amount and the direction to make the payment tax-free remained unaltered.

Income tax—tax-free annuity—Finance Act, 1941, s. 25—By a will made on April 29, 1938, a testator made a charitable bequest of "such a sum as will produce, after payment of tax and all other deductions, the clear yearly sum of £60". On what basis was the capital sum to be fixed, and, in particular, what effect (if any) must be given to section 25 of the Finance Act, 1941, the provision for the tax-free annuity being contained in a will made before September 3, 1939? This was the question which arose in *Re Powell*, [1944] 2 A. E. R. 528. In solving the problem, Vaisey, J., started from the principle that the gross amount of the annuity must be computed by reference to the current standard rate, the possibility of future variations of the rate being disregarded. But in the present case, a simple calculation by reference to the prevailing standard rate must—it was held—be qualified by the application of the rule laid down in section 25 of the Finance Act, 1941. From this it resulted that the capital sum must be such as would produce a net income, after deduction of tax at the current standard rate of 10s., of twenty twenty-ninths of £60, or £41 7s. 10d. Accordingly, there must be set aside a capital sum to produce a gross income of £82 15s. 2d.
